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8-10-11

No. 10073

United States

Circuit Court of Appeals

For the Ninth Circuit.

Vol
2339

WESTERN-KNAPP ENGINEERING CO., a
corporation,

Appellant,

vs.

O. T. GILBANK, Trustee of the Estate of Jumbo
Consolidated Mining Company, a corporation,
Bankrupt,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

APR - 2 1942

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ARTHUR P. SHAPRO, Esq.,
420 Russ Building,
San Francisco, California.

For Appellee:

MESSRS. MITCHELL, JOHNSON &
LUDWICK, JAMES H. MITCHELL, Esq.,
333 Roosevelt Building,
Los Angeles, California. [1*]

In the District Court of the United States
Southern District of California
Central Division

In the Matter of JUMBO CONSOLIDATED
MINING COMPANY, a corporation,
Debtor.

DEBTOR'S PETITION

To the Honorable, the Judges of the District Court
of the United States, for the Southern District
of California:

The petition of Jumbo Consolidated Mining Company, a corporation, respectfully represents, that it is organized and existing under and by virtue of the laws of the State of Nevada, and conducting

*Page numbering appearing at foot of page of original certified Transcript of Record.

business in the County of Los Angeles, State of California, and is a corporation engaged in the business of mining, having valuable mining properties in the State of California, valued at several hundred thousand dollars.

I.

Your Debtor has resided at and had its principal office at 225 Santa Monica Boulevard, Santa Monica, California within the above judicial district for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

II.

No bankruptcy proceedings, initiated by a petition by or against your Debtor, is now pending.

III.

Your Debtor is unable to pay its debts as they mature by reason of the fact that due to a conspiracy between various stockholders, employees, creditors and other persons with whom the corporation has done and is doing business, numerous actions have been instituted and attachments levied for the purpose of embarrassing, harassing and complicating the Debtor's business in order to wreck Debtor's business for the purpose of acquiring control of Debtor's stock and the management of Debtor's business. That said conspiracy was entered into [2] by one Howard H. Wikoff as the attorney, representative and agent of Edward D. Hub-

bard and Esther Hubbard, the father-in-law of the said Howard H. Wikoff, his Mother, Mary Wikoff, one Elizabeth Kiley, a bookkeeper in the employ of your Debtor, and one Frank S. Tyler, a Brother-in-law of W. J. Shaw, the President of Debtor corporation, in conjunction with other persons and corporations doing business with your Debtor. That at all the times the said Howard H. Wikoff was involved as aforesaid with the said persons, the said Wikoff was employed by your Debtor and had access to all the books and records of the Debtor and was paid moneys by the Debtor for the purpose of meeting the claims of all creditors as they fell due, which said moneys were sufficient, had same been properly applied, to have met all current obligations of the Debtor due its creditors of every kind and character, and that solely by reason of the failure of the said Howard H. Wikoff to properly apply said moneys on the claims of creditors and not by reason of any fault of the Debtor were the said claims of creditors against the Debtor permitted to be in default and thereby placed said creditors in a position to attach property and assets of the Debtor and embarrass the Debtor in the operation of its said business, and that by reason of said conspiracy and during the illness of the said W. J. Shaw, the said Howard H. Wikoff took possession of the office and books and records of the Debtor and consequently the affairs of the Debtor were not properly taken care of.

IV.

Your debtor proposes the following arrangements with its creditors, to be accomplished from the earnings of Debtor's business:

1. Debtor will pay in full all of the costs of these proceedings, expenses of administration herein, and the fees of the attorneys for the Debtor as the same may be fixed, established and ordered paid herein.

2. That Debtor will meet all of its obligations to its secured creditors at the time and in the manner prescribed for the payment thereof by agreement with said secured creditors.

3. That Debtor will liquidate in full all of the claims of its unsecured creditors by applying to the payment thereof all of the net proceeds of the Debtor's business until said unsecured creditors are liquidated in full, the [3] term "net proceeds" being the proceeds of Debtor's business remaining after the payment of all necessary expenses of operation of the said business and the payments to secured creditors, and the payment of the expenses of these proceedings as set forth in subdivision 1 of this Paragraph IV.

V.

That part of the assets of the Debtor are now under attachment and Debtor is handicapped in the operation of its business by virtue of said attachment. That W. J. Shaw, the President of the Debtor corporation, and the person in active man-

agement and control thereof, has been ill and incapacitated for the greater part of the last two months next preceding the filing of this petition, and by reason thereof and the fact that certain persons were conspiring to wreck the Debtor corporation, the books and records of the Debtor are not in proper shape and condition to enable the Debtor to file a true and correct schedule of its assets and liabilities at the present time. That the books of the Debtor corporation are now in the hands of a Certified Public Accountant for the purpose of audit and to bring the said records down to date so that a complete schedule of assets and liabilities can be prepared herein. That Debtor is advised by the Certified Public Accountant that approximately thirty days will be necessary to complete said records so that proper and correct schedules in bankruptcy can be prepared therefrom.

VI.

That by reason of the fact that the Debtor's books are not presently in the proper order, due to the illness of W. J. Shaw, the President, and the fact of the said conspiracy to wreck the Debtor Corporation's business, the Debtor is not at the present time in a position to file a true and correct statement of its affairs as provided by the Bankruptcy Act, and additional time should be granted Debtor for this purpose.

VII.

That annexed hereto, marked "Exhibit A" and made a part hereof is a list of Debtor's creditors to the best of Debtor's knowledge and belief at the present time. That by reason of the said conspiracy to wreck the business of Debtor and the condition of Debtor's books by reason thereof, and the illness of [4] W. J. Shaw, the President, it may be that from the said list of Debtor's creditors there have been omitted certain thereof, but said list will be completed correctly and fully by the time the schedules are filed herein.

VIII.

That annexed hereto, marked "Exhibit B" and made a part hereof is a list of Debtor's executory contracts to the best of Debtor's present information and belief.

IX.

That in the opinion of Debtor, the assets of Debtor's business are valued at several times over the amount of Debtor's debts; that the present earnings of the Debtor are sufficient to liquidate the debts of Debtor in full within a period of less than six months. That Debtor's present predicament is caused by the conspiracy to wreck the Debtor's business as aforesaid and the illness of said W. J. Shaw; said W. J. Shaw is now able to continue the active control and management of Debtor's business and Debtor is satisfied that within a period of less

than six months, all of its obligations can be liquidated in full, and by reason thereof an order should be made and entered herein keeping the Debtor in possession of its said assets and also directing the release of all attachments and garnishments now on the property of the Debtor.

X.

That in action No. 437-237 in the Superior Court in and for the County of Los Angeles, State of California, entitled Edward D. Hubbard vs. W. J. Shaw and Jumbo Consolidated Mining Company, a corporation, in which said action a garnishment was levied March 7th, 1939 on certain bullion concentrates and property of the Debtor in the possession of the American Smelting and Refining Co., and which said attachment is a serious handicap to the operation of Debtor's business in connection with the meeting of the Debtor's pay-roll and other current operating expenses.

XI.

That a majority in number and amount of the creditors of the Debtor are in favor of Debtor remaining in possession of his assets and have intimated full and complete confidence in the Debtor in the management of his business [5] and its ability to pay their claims in full.

Wherefore your Debtor prays that proceedings may be had upon this petition in accordance with the provisions of Chapter 11 of the Act of Congress

relating to Bankruptcy; that the Debtor be granted a period of thirty days within which to file a schedule of its assets and liabilities herein, and a statement of its affairs; that the Court make an order herein to retain the Debtor in possession and control of its business and property; that an order be made and entered herein releasing attachments on Debtor's property and restraining the prosecution of any action against the Debtor by any creditor or other person, and restraining the foreclosure of any of Debtor's property as a pledge or otherwise.

JUMBO CONSOLIDATED

MINING COMPANY,

a corporation,

By **W. J. SHAW,**

President

Debtor.

THOS. P. MENZIES and

WALTER C. DURST,

By **WALTER C. DURST,**

Attorneys for Debtor. [6]

EXHIBIT A

L. C. Duncan, 506 Bay Cities Bldg., Santa Monica, Calif.	\$7,300.00
Dr. George S. Leven, Channel Rd., Santa Monica Canyon, Santa Monica, California.....	6,200.00
Wyman Williams, 1401 California St., Santa Monica, Calif.	3,400.00
Dr. Homer J. Arnold, 412 W. 6th St., Los Angeles, Calif.	2,700.00
Emily Rice and Florence Arnold, 503 4th Ave., Los Angeles, Calif.	8,000.00
Tony Busier, 506 Bay Cities Bldg., Santa Monica, Calif.	22,000.00
W. C. Pope, Copperopolis, California.....	5,000.00
E. D. Hubbard, 9921 Durant Drive, Los Angeles, California	8,500.00
Mary Wikoff, Successor in interest of Henry L. Wikoff, 1354 No. Detroit, Los Angeles, Cal.....	3,100.00
Mary Wikoff, 1354 No. Detroit, Los Angeles, Calif.	2,260.00
Elizabeth Hamilton, 1354 No. Detroit, Los Angeles, Calif.	6,700.00
American Forge Co., 1823 E. Washington Blvd., Los Angeles, Calif.	183.17
Braun Corporation. 2260 E. 15th, Los Angeles, California	179.00
Limited Mutual Insurance Co., 510 W. 6th St., Los Angeles, Calif.	635.75
Nelson August, Copperopolis, California.....	6,591.62
John L. Witney, Jamestown, California.....	457.40
Western Machinery, Santa Monica, California.....	263.99
Pacific Ball Mfg. Co., Huntington Park, California.....	2,036.03
Calkins Company, 934 So. Main, Los Angeles, California	49.44
Graylor Engineering Co., Los Angeles, Calif.....	186.33
Industrial Indemnity Exchange, 112 West 9th St., Los Angeles, Calif.	135.73

[7]

EXHIBIT B

EXECUTORY CONTRACTS

American Smelting and
Refining Company,)
405 Montgomery Street,) Contract for smelting concentrates
San Francisco, California)

T. J. McCarty, Estate,) Agreement to pay \$150.00 per month
Copperopolis, California) until dividend on 40,000 shares of
Debtor stock equals \$150.00 per month

Robert D. Parks,) Agreement to pay \$250.00 per month
Clark Hotel,) until dividend on 40,000 shares of
Stockton, California) Debtor stock equals \$250.00 per month

[8]

United States of America
Southern District of California
Central Division—ss.

W. J. Shaw being by me first duly sworn, deposes and says: that he is the President of Jumbo Consolidated Mining Company, a corporation, and as such is duly authorized to make this verification on behalf of said Debtor, in the above entitled action; that he has read the foregoing Debtor's Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

W. J. SHAW.

Subscribed and sworn to before me this 15th day of March, 1939.

(Seal) SPENCER CABURNE,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Debtor's Petition. Filed Mar. 15, 1939, 4:48 P.M. R. S. Zimmerman, Clerk. By F. Betz, Deputy Clerk. [9]

[Title of District Court and Cause.]

CERTIFICATE OF RESOLUTION OF DIRECTORS
CONSENTING TO CHAPTER 11
PROCEEDINGS.

I, the undersigned Assistant Secretary of the Jumbo Consolidated Mining Company, do certify that a meeting of the Board of Directors of the said Jumbo Consolidated Mining Company, a corporation created under the laws of the State of Nevada, was held, pursuant to the provisions of the By-Laws of said corporation, at Santa Monica, in the County of Los Angeles, and State of California on the 14th day of March, 1939: that at said meeting the condition of the affairs of said corporation having been inquired into and it having been ascertained to the satisfaction of said meeting that the said corporation was unable to meet its debts as they matured and that it should avail itself of the provisions of the National Bankruptcy Act, it was, upon motion made, seconded, carried and duly

“Resolved: That the Jumbo Consolidated Mining Company file a petition for relief of a debtor under the National Bankruptcy Act.

It Is Further Resolved: That the president of the corporation, Mr. W. J. Shaw, is hereby empowered and authorized to act on behalf of said corporation and sign all necessary documents to complete the procedure under the National Bankruptcy Act for the relief of debtors.”

In Witness Whereof, I have hereunto subscribed my name as Assistant Secretary of said corporation, and affixed the seal of the same this 15th day of March, 1939.

(Seal)

E. C. PARKS,

Asst. Secretary of said
Corporation.

[Endorsed]: Certificate of Resolution of Directors Consenting to Chapter 11 Proceedings. Filed Mar. 15, 1939, 4:48 P.M. R. S. Zimmerman, Clerk, By F. Betz, Deputy Clerk. [10]

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE UNDER SEC-
TION..... of the BANKRUPTCY ACT.

At Los Angeles, in said District, on March 16, 1939 before the said Court the petition of Jumbo Consolidated Mining Company, a corporation that It desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Samuel W. McNabb, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Jumbo Consolidated Mining Company, a corporation shall attend before said referee on March 23, 1939 and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Paul J. McCormick, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on March 16, 1939.

(Seal) R. S. ZIMMERMAN,

Clerk,

By H. K. JACOBS,

Deputy Clerk.

[Endorsed]: Filed Mar. 16, 1939, 12:02 P.M.
R. S. Zimmerman, Clerk, By H. K. Jacobs, Deputy
Clerk. [11]

[Title of District Court and Cause.]

ORDER OF ADJUDICATION OF
BANKRUPTCY.

At Los Angeles in Said District, on the 11th Day of September, 1940:

The said Jumbo Consolidated Mining Company, a corporation, as debtor, having filed a petition under section 322, Chapter XI of the Bankruptcy Act, and a notice of meeting of the creditors having been called for confirmation of arrangement, which was set for July 18th, 1939, at 10:00 o'clock A.M., and the matter having been continued from time to time until August 21st, 1940, at 2:00 o'clock P.M., of said day, and due and regular notice having been given to all parties in interest of a meeting of creditors to be held September 11, 1940, at 2:00 o'clock P.M., at the court room of the undersigned Referee in Bankruptcy, 340 Federal Building, Temple and Spring Streets, Los Angeles, California, for the purpose of determining whether the said Jumbo Consolidated Mining Company be adjudged a bankrupt or the case then pending be dismissed, and, if adjudged a bankrupt, that an election of a trustee will be held, and it appearing that the said Jumbo Consolidated Mining Company has failed to deposit the money necessary to pay all debts which have priority, and not waived, and has failed to deposit the money necessary to pay the costs and expenses of the said debtor's proceeding within the time fixed by this court, and no feasible plan having been filed, and it is further appearing that the said

Jumbo Consolidated Mining Company has admitted in writing that it is insolvent and is unable to pay its debts as they mature, upon appli- [12] cation of creditors of said Jumbo Consolidated Mining Company that said corporation be adjudged a bankrupt under the Act of Congress relating to bankruptcy and that bankruptcy be proceeded with, and no adverse interest being represented at said hearing and no opposition expressed with regard thereto, upon motion of James H. Mitchell, hereinbefore duly and regularly appointed attorney for the Committee of Creditors of said Jumbo Consolidated Mining Company herein, and good cause appearing therefor, it is Ordered Adjudged and Decreed:

That said Jumbo Consolidated Mining Company, a corporation, is a bankrupt under the Act of Congress relating to bankruptcy and that bankruptcy be proceeded with; and that, upon the entry of this order, the proceedings shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed, and a decree of adjudication had been entered, on the 15th day of March, 1939, the day when the petition under Chapter XI of said Act was filed herein.

SAMUEL W. McNABB,
Referee.

[Endorsed]: Order of Adjudication of Bankruptcy. Filed Sep. 17, 1940, 10:40 A.M. R. S. Zimmerman, Clerk, By H. K. Jacobs, Deputy Clerk.

[13]

[Title of District Court and Cause.]

STIPULATION.

It is hereby stipulated by and between Hubert F. Laugharn, as Trustee for the said Jumbo Consolidated Mining Company, a corporation, Bankrupt, and Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, that the Trustee's Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and To Avoid Lien attached hereto and made a part hereof may be filed herein and heard by the Honorable Samuel W. McNabb, Referee in Bankruptcy, or any other referee who may be available, on Friday the 13th day of December, 1940, at 10:00 o'clock A.M., of said day, or as soon thereafter as it may be convenient with the court, and that all testimony heretofore introduced in evidence upon the hearing, on January 30, 1940, of the petition of Edward W. Hubbard, George F. Snyder, George W. Leach, Howard H. Wikoff and W. J. Shaw, as the Committee of Creditors of Jumbo Consolidated Mining Company, a corporation, as debtor, heretofore filed herein on or about September 29th, 1939, and the Order to Show Cause and Restraining Order issued pursuant thereto on September 29th, 1939, may be considered as evidence introduced upon the hearing of the said Trustee's Petition to the same extent and in the same manner as though originally introduced upon the hearing of the said Trustee's Petition; and that,

pending the hearing and final determination of said petition, and without prejudice to any of the rights of any of the parties hereto upon the issues joined and to be joined upon the annexed Petition to Recover Assets, a restraining order may be [14] issued by the above-entitled court restraining and enjoining said Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, from taking any steps, or doing any thing, or taking any action, in connection with the removal of any of the mining machinery and equipment, or the foreclosure of the contracts of conditional sale, referred to in the said Trustee's petition, and that an order may be forthwith made and entered herein to carry into effect the object and purpose of this stipulation, and so that said petition may be duly and regularly heard by the above court.

It is hereby further stipulated that upon the filing herein of said annexed Petition to Recover Assets, and the issuance by the above-entitled court of the Order to Show Cause and Temporary Restraining Order hereinabove specified, the petition of said Committee of Creditors heretofore filed herein on the 29th day of September, 1939, and the Order to Show Cause thereon issued herein on said date, and to which said Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, are respondents, shall be, by the above-entitled court, respectively dismissed and discharged, without prejudice.

Dated: November 13th, 1940.

HUBERT F. LAUGHARN,

Trustee for Jumbo Consoli-
dated Mining Company,
a corporation, Bankrupt.

JAMES H. MITCHELL,

CLIVE W. JOHNSON and

FRANK M. LUDWICK,

By JAMES H. MITCHELL,

Attorneys for said Trustee in
Bankruptcy,

WESTERN-KNAPP

ENGINEERING COMPANY,
a corporation,

By H. N. HOW (Seal)

President

WESTERN MACHINERY

COMPANY, a corporation,

By H. N. HOW (Seal)

President

ARTHUR P. SHAPRO,

Attorney for Western-Knapp
Engineering Company and
Western Machinery
Company.

[Endorsed]: Filed Nov. 28, 1940, Samuel W. Mc-
Nabb, Referee. Filed Aug. 22, 1941, R. S. Zimmer-
man, Clerk. [15]

[Title of District Court and Cause.]

PETITION TO RECOVER ASSETS FRAUDU-
LENTLY OR PREFERENTIALLY TRANS-
FERRED BY BANKRUPT AND TO AVOID
LIEN.

To the Honorable Samuel W. McNabb, Referee in
Bankruptcy:

The petition of Hubert F. Laugharn, Trustee of
the estate of the above named bankrupt, respect-
fully represents:

I.

That on March 15th, 1939, Jumbo Consolidated
Mining Company, a corporation, as Debtor, filed its
petition under Section 322, Chapter XI of the
Bankruptcy Act; and that said Jumbo Consolidated
Mining Company, a corporation, was duly and regu-
larly adjudicated a bankrupt on the 11th day of
September, 1940. That on the 16th day of Septem-
ber, 1940, your petitioner was appointed, and duly
qualified, as Trustee of said estate, and is now act-
ing as such Trustee.

II.

That the bankrupt is a corporation duly or-
ganized and existing under and by virtue of the
laws of the State of Nevada, and, at all times since
on or about September 1st, 1937, said bankrupt has
been qualified to do business, and has done and
carried on business, in the State of California.
That at all times hereinafter mentioned said bank-

rupt has been, and is now, a resident of the State of California residing, and having its principal place of business within the State of California, in the County of Los Angeles.

III.

That Western-Knapp Engineering Company, a corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of California. [16]

IV.

That the Western Machinery Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah.

V.

That petitioner is informed and believes, and upon such information and belief alleges, that on May 23d, 1938, an instrument in writing was delivered to said Western-Knapp Engineering Company purporting to convey to said Western-Knapp Engineering Company all of the bankrupt's right, title and interest in and to certain mining machinery and equipment then located at the Mt. King Mine and which was owned and in the possession of the bankrupt. That said property is more particularly set forth and described in Exhibit "B" attached to and made a part of the purported contract of conditional sale dated May 23d, 1938, wherein said Western-Knapp Engineering Company, a corpora-

tion, is designated as the seller and the bankrupt is designated as the buyer. That said mining machinery and equipment is more particularly set forth and described in Exhibit 1 attached hereto and made a part hereof. That the said Mt. King Mine is located in the County of Calaveras, State of California, and is now and has been at all times since on and prior to September 1st, 1937, a mining property operated, developed and in the possession of the bankrupt.

VI.

That at the time of the said delivery of said purported conveyance the bankrupt had the possession and control of all said mining machinery and equipment but that said mining machinery and equipment was not, on the said 23d day of May, 1938, nor at any other time or at all, delivered to said Western-Knapp Engineering Company, nor has said Western-Knapp Engineering Company ever had possession thereof, and that at all times since on and prior to May 23d, 1938, the said mining machinery and equipment has remained in the possession of the bankrupt, during which time numerous persons [17] have become and now are creditors of the bankrupt. That the names of such creditors, and the amounts owing to them from the bankrupt incurred by the bankrupt during the time when the bankrupt had possession of said mining machinery and equipment, are more particularly set forth in the claims of such persons now on file herein in the above entitled proceeding.

VII.

That petitioner is informed and believes, and upon such information and belief alleges, that on the said 23d day of May, 1938, an instrument purporting to be a contract of conditional sale was purportedly executed by and between said Western-Knapp Engineering Company, as seller, and the bankrupt, as buyer, wherein Western-Knapp Engineering Company purported to sell, and the bankrupt purported to buy, under the terms and conditions thereof certain mining machinery and equipment set forth and described in Exhibit "A" attached thereto and made a part thereof. That the purported contract of conditional sale, together with said Exhibit "A" and the above mentioned Exhibit "B", is now on file herein. That reference is made thereto for further particulars.

VIII.

That petitioner is informed and believes, and upon such information and belief alleges, that on the said 23d day of May, 1938, a portion of said mining machinery and equipment described in Exhibit "A" was located in various counties of the State of California and certain other portions of said mining machinery and equipment was not in existence. That the description of said mining machinery and equipment described in said Exhibit "A", and the counties in which said mining machinery and equipment was located on the said 23d day of May, 1938, is set forth and described in

Exhibit 2 attached hereto and made a part hereof. That said contracts of conditional sales has never been recorded in the office of the County Recorder of any county except the County of Calaveras. [18]

IX.

That petitioner is informed and believes, and upon such information and belief alleges, that at all times since on and after the 16th day of August, 1938, the bankrupt has had, and now has, the possession and control of all that certain mining machinery and equipment more particularly set forth and described in that certain schedule attached hereto, made a part hereof and marked Exhibit 3. That at no time during said period has said mining machinery and equipment, or any part thereof, been delivered to said Western Machinery Company, nor has said Western Machinery Company during any of said time had possession of said mining machinery and equipment, or any part thereof.

X.

That petitioner is informed and believes, and upon such information and belief alleges, that on the said 16th day of August, 1938, a purported contract of conditional sale was purportedly executed by said Western Machinery Company, as seller, and the bankrupt, as buyer, wherein and whereby the said Western Machinery Company purported to sell, and the bankrupt purported to buy, said mining machinery and equipment described in Exhibit 3.

XI.

That petitioner is informed and believes, and upon such information and belief alleges, that the Board of Directors of the bankrupt has never at any time authorized the execution of said purported contracts of conditional sale or said purported conveyances.

XII.

That petitioner is informed and believes, and upon such information and belief alleges, that said purported contracts of conditional sale and said purported conveyances are fraudulent and [19] therefore void as against all the creditors of the bankrupt.

XIII.

That petitioner is informed and believes, and upon such information and belief alleges, that said Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, have threatened to proceed with the foreclosure of said purported contracts of conditional sale and remove the said mining machinery and equipment from the place of its present location at the Mt. King Mine in Calaveras County. That the removal of said mining machinery and equipment would prevent your petitioner from making a satisfactory sale of the property and assets of the bankrupt and make it impossible for your petitioner to obtain the benefits of avoiding said purported contracts of conditional sale and purported conveyances as pro-

vided by the Bankruptcy Act. That the said mining machinery and equipment constitutes the main assets of the bankrupt and is a very valuable asset of the bankrupt, having a reasonable value in place of approximately \$50,000.00. That great and irreparable injury and damage would be done to this estate if said Western-Knapp Engineering Company and Western Machinery Company were permitted to remove the same from its present location or in any way interfere therewith.

XIV.

That within four months prior to March 15, 1939, the bankrupt paid to said Western-Knapp Engineering Company and said Western Machinery Company upwards to \$10,000.00 for or on account of an antecedent debt, to-wit, the said purported contracts of conditional sale. That at the time of said payment the bankrupt was insolvent. That the effect of said payment will be to enable the said companies to obtain a greater percentage of their debt owing to them from the bankrupt than other creditors of the same class. That at the time of said payment the said companies and their agents acting with reference thereto had, at the time when [20] said payment was made, reasonable cause to believe that the bankrupt was insolvent.

Wherefore, petitioner prays that an order or orders issue:

1: Ordering that Western-Knapp Engineering Company, a corporation, and Western Machinery

Company, a corporation, be required to appear before this Honorable Court to be examined concerning the acts, conduct and property of the bankrupt and to bring with them the books and papers under their control relating to said properties.

2: Restraining Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, and each of them, from proceeding with the foreclosure of said purported contracts of conditional sale with respect to the mining machinery and equipment therein described, and from doing anything or taking any action, legal or otherwise, in connection with the removal of said mining machinery and equipment, or any part thereof, from the possession of the bankrupt or the trustee, or from in any way interfering with the use, operation and sale of said mining machinery and equipment by the trustee herein, and that an order to show cause issue herein with respect thereto, and that until the return day thereof said Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, and each of them, be restrained from doing any thing, or taking any action, legal or otherwise, in connection with the removal of said mining machinery and equipment, or any part thereof, from the possession of the bankrupt or the trustee, or from in any way interfering with the use and operation of said mining machinery and equipment by the trustee herein.

3: Ordering that the conditional sales contracts of Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, respectively, are fraudulent and void as [21] to the lien or interest claimed by those companies in the mining machinery and equipment therein described as against all creditors of the bankrupt.

4: Ordering and finding that all payments of money made by the bankrupt to said Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, within four months prior to March 15, 1939, constitute a preference as against the other creditors of the bankrupt, and determining the amount thereof.

5: Ordering and granting such other and further relief as to this court may seem proper.

HUBERT F. LAUGHARN,

Petitioner.

JAMES H. MITCHELL,

CLIVE W. JOHNSON and

FRANK M. LUDWICK,

By JAMES H. MITCHELL,

Attorneys for Petitioner.

State of California

County of Los Angeles—ss.

Hubert F. Laugharn, being by me first duly sworn, deposes and says; that he is the petitioner in the above entitled action; that he has read the fore-

going Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information and belief, and as to those matters that he believes it to be true.

HUBERT F. LAUGHARN.

Subscribed and sworn to before me this 17th day of October, 1940.

(Seal) JAMES H. MITCHELL,
Notary Public in and for the County of Los Angeles, State of California. [22]

EXHIBIT 1

- 1—5x5 Marcy Ball Mill, #397, with V-belt drive and 60 HP motor, complete with sheave, slide rails and compensator.
- 3—Fagergren Flotation Machines, size 11-s, Type Std. Square, 720 RPM, Serial Nos. 21, 22 & 23.
- 2—Fagergren Flotation Machines, size 36x9, Type Std. Square, 600 RPM, one Serial No. 322, no number other machine.
- 1—Fagergren Flotation Machine, size 9-S Type Std. Square, 900 RPM, Serial No. S-51.
- 1—54" Duplex Dorr Classifier, with motor and V-belt drive, classifier Serial No. 1275D.
- 1—18x18 Pan American Jig, Type AC, No. 271.
- 1—Hoist Motor, Westinghouse Oil Well Motor, varying speed, 75 HP, 440 volts, 50/60 cycle, 3 phase, style 21C482, Frame 752, 90 Amps, 970-1160 RPM, full load, Serial #4501040.
- 1—Westinghouse Controller, Frame 50, Style S020 E171.

[23]

EXHIBIT "2"

Counties in
which located
5-23-38

- | | |
|---|---------------|
| 1—22x13x16 Ingersoll-Rand, Imperial Type, 2 stage, Air Compressor, complete with 200 HP, General Electric, 440 volt, 3 phase, 60 cycle motor, furnished with sheave and 13 V-belts, complete with sliding base and compensator. | Mariposa |
| 1—100 H.P. Double Drum Ottumwa Iron Works Mine Hoist, complete with 100 H.P., 440 volt, 3 phase, 60 cycle, variable speed motor complete with resistance grids and drum controller. | State of Utah |
| 1—Taper Bar Grizzly. | Non-existent |
| 1—15x38 Wheeling Jaw Crusher with V-belt drive and 75 HP, 440 volt, 3 phase, 60 cycle motor, with sliding base and compensator. | Sacramento |
| 1—16" Belt Conveyor with magnetic pulley and motor generator set. | Calaveras |
| 1—4x5 Leahy Vibrating Screen. | Calaveras |
| 1—2'4" Type TY Traylor Secondary Crusher, complete with 75 HP, 440 volt, 3 phase 60 cycle motor, with sliding base, V-belt drive and compensator | Non-existent |
| 1—8x5 Bucket Elevator, 40' centers, with gear head, motor and drive | Calaveras |
| 1—16" Adjustable Speed Belt Feeder, with 16" conveyor to present ball mill with motor and drive. | Non-existent |
| 1—Adjustable Speed Belt Feeder for new ball mill with motor and drive. | Non-existent |
| 1—6x8 Handy Overflow Ball Mill, with motor and V-belt drive. | Calaveras |
| 1—6'x23'4" Model BHM Wemco Classifier with variable speed drive and U. S. Motor | Tuolumne |
| 1—26"x26", 2-cell, Bendelari Jig. | Calaveras |

Counties in
which located
5-23_38

- | | |
|---|--------------|
| 1—3" Wilfley type pump with 7½ HP motor and drive. | Non-existent |
| 4—44" Fagergren Flotation Cells, motor driven, with reagent feeders. | Tuolumne |
| 1—16'x8' Thickener Tank, complete with low head superstructure, motor, mechanism, overflow launder and sills; 2 inch diaphragm pump complete with motor and driver. | Non-existent |
| 1—4', 3 disc New American Type Filter. | Arizona |
| 1—Deister-Plato Concentrating Table, with motor and drive. | Non-existent |

[24]

EXHIBIT "3"

- 1—Pantograph—Ratio 15½ to 1
- 1508'4"—1" Standard Black Pipe
- 4—50' lengths, ¾" Air Hose, complete with couplings
- 4—50' lengths, ¾" Air Hose, complete with couplings
- 5—50' lengths, Water Hose, complete with couplings
- 1—400 Amp. Style 918-153, Type ABI, 3 pole, 600 volt, Westinghouse Circuit Breaker
- 1—600 Amp. Style 918-157, Type ABI, 3 pole, 600 volt, Westinghouse Circuit Breaker
- 1—2"MRV25, Ingersoll-Rand Cameron Motor Pump, with cross-the-line starter, magnetic push button, over and under voltage protection, suction and discharge flanges.
- 1—50 cu. ft. 28" gauge, Roller Bearing Ore Skip
- 1—type 6 HC, Ingersoll-Rand, double drum, Air Hoist
- 2—HNN-1-J, Ingersoll-Rand, double drum, Air Hoists, Serials Nos. 306 & 379-S @ 820.00
- 3—WEMCo Slip Scrapers, with bridles @ 150.00

- 1—No. 5, Ingersoll-Rand Drill Sharpener, complete with accessories for 1" quarter octagon steel, Serial No. 1625, IRLP shank & bit punch and late type hammer cylinder
- 6—24 cu. ft., 18" gauge, roller bearing, Greene Side Dump Ore Cars @ 145.00
- 4—DA30 Ingersoll-Rand Air Drifters, Serial Nos. 456570, 457918, 457884, & 457923 @ 390.00
- 1—SAR-120, Ingersoll-Rand Stoper with 1" quarter octagon chuck, Serial No. 442018
- 3—3½"x7' Columns complete @ 60.00
- 2—Column Clamps @ 3.10
- 2—#1167 Chuck Wrenches @ 3.00
- 3—3½" Column Arms @ 21.00
- 2—3½" Saddles @ 21.00

[Endorsed]: Stipulation and Petition Filed Nov. 28, 1940. Samuel W. McNabb, Referee. Filed Aug. 22, 1941 R. S. Zimmerman, Clerk. [25]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE ON TRUSTEE'S
PETITION TO RECOVER ASSETS
FRAUDULENTLY OR PREFERENTI-
ALLY TRANSFERRED BY BANKRUPT
AND TO AVOID LIEN.

At Los Angeles, in Said District, on the 28th Day
of November, 1940:

Upon the Petition of Hubert F. Laugharn, Trus-
tee of the Estate of the said bankrupt, verified the
17th day of October, 1940, and filed, for an Order

to Show Cause and Restraining Order against the respondents, Western-Knapp Engineering Company, a corporaiton, and Western Machinery Company, a corporation, and the Stipulation of the said respondents and their attorney, Arthur P. Shapro, and the said Trustee and his attorneys, James H. Mitchell, Clive W. Johnson and Frank M. Ludwick, dated November 13th, 1940, and upon motion of the said trustee, no adverse interests being represented, it is

Ordered that respondents, Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, be and appear before this court in the courtroom thereof on the third floor of the Federal Building, 312 North Spring Street, Los Angeles, California, on the 16th day of December, 1940, at the hour of 10:00 o'clock A. M., of said day, and then and there set up their respective claims to the machinery and equipment referred to and described in said petition or be forever debarred from asserting the same, and bring with them the books and papers under their control relating to the said machinery and equipment, and show cause why

1: An order should not be made and entered herein restraining the said respondents and each of them from proceeding with the foreclosure of the purported contracts of conditional sale referred to in said petition with respect to the mining machinery and equip- [27] ment described in said petition, and from doing anything or taking any

action, legal or otherwise, in connection with the removal of the said mining machinery and equipment or any part thereof from the possession of the bankrupt or the trustee, or from in any way interfering with the use, operation and sale of said mining machinery and equipment by the trustee herein; and,

2: An order should not be made ordering, declaring and finding that the said conditional sales contracts of the said respondents, Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, respectively, are and each of them is fraudulent and void as to the lien or interest claimed by said respondents in the said mining machinery and equipment; and,

3: An order should not be made ordering and finding that all payments of money made by the Bankrupt to said respondents, Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, within four months prior to March 15th, 1939, constitute a preference as against the other creditors of the bankrupt and determining the amount thereof; and,

4: An order should not be made granting such other and further relief as to the said court may seem proper.

Ordered that pending the hearing of the within order to show cause and until further order herein the said respondents, Western-Knapp Engineering Company, a corporation, and Western Machinery

Company, a corporation, and each of them, be, and they are hereby, restrained and enjoined from doing anything or taking any action, legal or otherwise, in connection with the removal of said mining machinery and equipment or any part thereof from the possession of the bankrupt or the trustee, or from in any way interfering with the use and operation of said mining machinery and equipment by the trustee herein.

Ordered that service of this order may be made upon the said respondents, Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, by mailing a [28] certified copy of this order to show cause and restraining order to their attorney, Arthur P. Shapro, Esq., at 420 Russ Building, San Francisco, California, on or before the 28th day of November, 1940.

HUGH L. DICKSON

Referee.

[Endorsed]: Filed Feb. 13, 1942. R. S. Zimmerman, Clerk. [29]

ARTHUR P. SHAPRO

420 Russ Building

San Francisco, California

Douglas 0664

Attorney for Respondents,

Western-Knapp Engineering Co.

and Western Machinery Company

[Title of District Court and Cause.]

ANSWER TO "PETITION TO RECOVER
ASSETS FRAUDULENTLY OR PREFER-
ENTIALLY TRANSFERRED BY BANK-
RUPT AND TO AVOID LIEN."

Come now Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, and answer as follows the "Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien," heretofore filed herein by Hubert F. Laugharn, Trustee of the estate of the Bankrupt above-named.

[30]

I.

Admit each and every, all and singular, the allegations contained in paragraphs numbered I, III and IV of said Trustee's Petition.

II.

Deny that at all times in said Trustee's Petition mentioned and/or at any time or at all, said Bankrupt has been and/or is now a resident of the State of California and/or that said Bankrupt was or is residing and/or had or has had, or is having its

principal place within the State of California, in the County of Los Angeles, and except as hereinabove otherwise denied, Respondents admit the allegations set forth in paragraph II of said Trustee's Petition.

III.

Admit each and all of the allegations contained in paragraph V of said Trustee's Petition; and in that connection, Respondents allege that the original of said Bill of Sale, dated and duly executed by said Bankrupt on the said 23rd day of May, 1938, is on file with the above-entitled Court in the above-entitled proceeding, in that same was, by Respondents, regularly introduced and received in evidence by Hon. Samuel W. McNabb, Referee in Bankruptcy, at a hearing had before said Court on the 30th day of January, 1940, upon the petition of Edward W. Hubbard, George F. Snyder, George W. Leach, Howard H. Wikoff and W. J. Shaw, as the Committee of Creditors of said Bankrupt, theretofore filed herein on or about the 29th day of September, 1939, and upon which said Referee, on said 29th day of September, 1939, issued an Order to Show Cause and Restraining Order, to which these Respondents were parties, and which said Bill of Sale was and is marked as "Respondents' Exhibit C" herein, and same is hereby expressly referred to and made part of this Answer. [31]

IV.

Admit each and every, all and singular, the allegations contained in paragraph VI of said Trustee's

Petition, saving and excepting that Respondents deny, for lack of information or belief sufficient to enable them, or either of them, to answer in that regard, the allegations and/or recitals contained in said paragraph VI, commencing with the word "during" on the last line of page 2 in said Trustee's Petition, and ending on line 6 of page 3 of said Petition.

V.

Admit each and all of the allegations contained in paragraph VII of said Trustee's Petition; and in that connection Respondents allege that the original of said Contract of Conditional Sale, dated the said 23rd day of May, 1938, but executed by said Bankrupt and Respondent Western-Knapp Engineering Co. on the 24th day of May, 1938, and within twenty days thereafter was duly recorded in the office of the County Recorder of the County of Calaveras, State of California, is designated and marked by the above-entitled Court as "Petitioner's Exhibit No. 6" herein, and was received in evidence by the above-entitled Court at the aforesaid hearing held before said Court on the said 30th day of January, 1940, and Respondents further allege that coincidentally with the making, execution and delivery of the aforesaid Contract of Conditional Sale, more particularly in said paragraph VII of said Trustee's Petition referred to, there was made, executed and delivered, by said Bankrupt to said Respondent Western-Knapp Engineering Co., a Supplemental Agreement on Conditional Sale, simi-

larly dated the said 23rd day of May, 1938, the original of which is on file herein, which was received in evidence by said Court as, and marked, "Respondents' Exhibit A" upon said hearing, held before said Court on the said 30th day of January, 1940, [32] and that Respondents hereby expressly refer to said original Contract of Conditional Sale and Supplemental Agreement on Conditional Sale and make them a part of this Answer.

VI.

Admit each and all of the allegations contained in paragraph VIII of said Trustee's Petition; and in that connection Respondents allege that the locations of various portions of said mining machinery and equipment, more particularly referred to in said paragraph and set forth in Exhibit "2" of said Trustee's Petition, were the same on the 24th day of May, 1938, as they were on the 23rd day of May, 1938, as in said Trustee's Petition alleged.

VII.

Admit each and every, all and singular, the allegations contained in paragraph IX of said Trustee's Petition.

VIII.

Admit each and every, all and singular, the allegations contained in paragraph X of said Trustee's Petition; and in that connection, Respondents allege that the original of said Contract of Conditional Sale, dated the said 16th day of August, 1938,

but executed by said Bankrupt and Respondent Western Machinery Company on the 17th day of August, 1938, and within twenty days thereafter was duly recorded in the office of the County Recorder of the County of Calaveras, State of California, is designated and marked by the above-entitled Court as "Petitioner's Exhibit No. 1" herein, and was received in evidence by the above-entitled Court at the aforesaid hearing held before said Court on the said 30th day of January, 1940.

IX.

Deny each and every, all and singular, the allegations contained in paragraph XI of said Trustee's Petition; and [33] Respondents allege that at a regular meeting of the Board of Directors of said Bankrupt, held on or about the 26th day of January, 1939, in the City and County of San Francisco, and at which all of the members of said Board of Directors were personally present and participated therein, certain amendments to the aforesaid Contracts of Conditional Sale, made by said Bankrupt, respectively, with Respondents Western-Knapp Engineering Co. and Western Machinery Company, and dated, respectively, as aforesaid, the 23rd day of May, 1938, and the 16th day of August, 1938, were approved and confirmed; and that duly certified copies of the minutes of said meeting of said Board of Directors, and of the aforesaid resolutions modifying, in certain particulars only, the terms of said Contracts of Conditional Sale, are on

file herein and marked "Respondents' Exhibits E and F" of said hearing held before said Court on the said 30th day of January, 1940, and Respondents hereby expressly refer to said certified copies of said minutes and resolutions and make same a part of this Answer.

X.

Deny each and every, all and singular, the allegations contained in paragraph XII of said Trustee's Petition, and Respondents hereby expressly refer to and make part of this Answer, their respective Answers verified on the 5th day of October, 1939, and heretofore filed herein, upon and in response to the Order to Show Cause and Petition of Creditors' Committee, more particularly hereinabove referred to, and respectively issued by this Court and/or filed herein by said Creditors' Committee on the said 29th day of September, 1939; and Respondents hereby re-aver, as part of this Answer to said Trustee's Petition, each and all of the allegations contained in their respective previous Answers, saving and excepting the allegations of paragraphs numbered VI in said previous Answers, heretofore verified [34] herein by these Respondents on the said 5th day of October, 1939, and heretofore filed herein as aforesaid.

XI.

Admit the allegations contained in the first sentence of paragraph XIII of said Trustee's Petition, ending with the words "Calaveras County" on

line 9 of page 5 of said Petition, and deny each and every, all and singular, the other allegations and/or recitals contained in said paragraph XIII of said Trustee's Petition.

XII.

With respect to the allegations set forth in paragraph XIV of said Trustee's Petition, Respondents admit that there was, within the four months next preceding the 15th day of March, 1939, paid by said Bankrupt to Respondent Western-Knapp Engineering Co., on account of the said Contracts of Conditional Sale between said Bankrupt and these Respondents, the sum of \$10,000.00; and in that connection, Respondents allege that on or about the 31st day of January, 1939, said Respondent Western Machinery Company, for value, assigned and transferred its said Contract of Conditional Sale with said Bankrupt, dated the said 16th day of August, 1938, to Respondent Western-Knapp Engineering Co., and that Respondent Western-Knapp Engineering Co. ever since has been and still is the lawful owner and holder thereof, and is entitled to all of the rights and privileges thereunder of the "Seller" therein named; and that all payments made by said Bankrupt in the premises, on or after the 26th day of January, 1939, were so made by said Bankrupt to Respondent Western-Knapp Engineering Co. and were applied by said payee to and in reduction of the obligations of said Bankrupt under and on account of both of the aforesaid Contracts

of Conditional Sale between said Bankrupt and these Respondents. [35]

Except as herein in this paragraph of this Answer otherwise admitted, these Respondents deny each and every, all and singular, the allegations contained in said paragraph XIV of said Petition.

XIII.

That there was due and owing to Respondent Western-Knapp Engineering Co. as of the 7th day of October, 1940, a balance of \$38,910.02, inclusive of principal and accrued interest, upon said Contracts of Conditional Sale between said Bankrupt and said Respondent, and Respondent Western Machinery Company, no part of which has been paid, and the whole of which, plus interest accruing, pursuant to the terms of said Contracts, subsequent to the said 7th day of October, 1940, is now wholly past due and payable to said Respondent Western-Knapp Engineering Co.

XIV.

That by reason of the premises and of the allegations hereinabove and in the two previous Answers (respectively verified by these Respondents on the 5th day of October, 1939, and heretofore filed herein) set forth, Respondents are, and at all of the times hereinabove and in said Trustee's Petition set forth were, the owners of each and all of the personal property more particularly in said two Contracts of Conditional Sale and in said Exhibits

Nos. 1, 2 and 3 of said Trustee's Petition described; and are entitled to possession of each and all of said personal property, as against the estate of said Bankrupt and/or Hubert F. Laugharn, as such Trustee of said estate.

Wherefore, Respondents, and each of them, pray that said Trustee take nothing by reason of his said "Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien"; that Orders be herein made denying said Trustee's Petition, with prejudice to the renewal thereof, discharging the [36] Order to Show Cause heretofore issued herein by Hon. Hugh L. Dickson, Referee in Bankruptcy, on the 28th day of November, 1940, and dissolving the Temporary Restraining Order in said Order to Show Cause contained; and for such other, further and different order, judgment, decree or relief as to this Honorable Court may seem just in the premises.

WESTERN-KNAPP ENGI-
NEERING CO.,

By H. N. HOW [Seal]

Its President

WESTERN MACHINERY
COMPANY,

By H. N. HOW [Seal]

Its President

Respondents.

ARTHUR P. SHAPRO

Attorney for Respondents

United States of America
Northern District of California
City and County of San Francisco—ss.

H. N. How, being first duly sworn, deposes and says:

That he is an officer, to wit, President, of Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, respectively, the Respondents named in the foregoing Answer, and as such is duly authorized to and does make this verification on behalf of said corporations. That he has read said Answer and knows the contents thereof, and that the same is true of his knowledge, except as to those matters therein alleged on information or belief, and as to such matters he believes it to be true.

H. N. HOW

Subscribed and sworn to before me this 12th day of December, 1940.

[Seal]

LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 13, 1940. Hugh L. Dickson, Referee. Filed Aug. 22, 1941. R. S. Zimmerman. Clerk. [37]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between O. T. Gilbank, as Trustee for the said Jumbo Consolidated Mining Company, a corporation, Bankrupt, and Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, that said O. T. Gilbank, as trustee for the said Jumbo Consolidated Mining Company, a corporation, Bankrupt, may be substituted as the petitioner in the place and stead of Hubert F. Laugharn in the petition to recover assets fraudulently or preferentially transferred by bankrupt and to avoid lien now on file herein, and that paragraph I of said petition may be amended to read as follows:

“That on March 15th, 1939, Jumbo Consolidated Mining Company, a corporation, as Debtor, filed its petition under Section 322, Chapter XI of the Bankruptcy Act; and that said Jumbo Consolidated Mining Company, a corporation, was duly and regularly adjudicated a bankrupt on the 11th day of September, 1940. That on the 16th day of September, 1940, Hubert F. Laugharn was duly and regularly appointed, qualified and acted as trustee of said estate. That thereafter said Hubert F. Laugharn duly and regularly resigned as trustee of said estate whereupon your petitioner, O. T. Gilbank, was duly and regularly appointed and qualified as trustee of said estate and is now acting as such trustee.”

It is further stipulated that all stipulations and pleadings heretofore filed by said Hubert F. Laugharn shall have the same force and effect as though originally entered into or filed by said O. T. Gilbank as trustee of the estate of the above [38] named bankrupt.

Dated: February 19th, 1940.

O. T. GILBANK

Trustee for Jumbo Consolidated
Mining Company, a corporation,
a Bankrupt

JAMES H. MITCHELL, CLIVE
W. JOHNSON and FRANK M.
LUDWICK

By JAMES H. MITCHELL
Attorneys for said Trustee in
Bankruptcy.

WESTERN-KNAPP ENGI-
NEERING COMPANY,
a corporation,

By H. N. HOW
President

WESTERN MACHINERY
COMPANY, a corporation

By H. N. HOW
President

ARTHUR P. SHAPRO

Attorney for Western-Knapp
Engineering Company and
Western Machinery Company

[Endorsed]: Filed Feb. 19, 1941. Hugh L. Dickson, Referee. Filed Aug. 22, 1941. R. S. Zimmerman, Clerk. [39]

[Title of District Court and Cause.]

ORDER

At Los Angeles in Said District on the 6th Day of
June, 1941:

Hubert F. Laugharn, as trustee of the estate of Jumbo Consolidated Mining Co., a corporation, Bankrupt, having duly and regularly filed his petition to recover assets fraudulently or preferentially transferred by the bankrupt and to avoid liens claimed by Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, and an Order to Show Cause having been issued upon said Trustee's petition wherein said Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, were required to show cause why

1: an order should not be made and entered herein restraining the said respondents and each of them from proceeding with the foreclosure of the purported contracts of conditional sale referred to in said petition with respect to the mining machinery and equipment described in said petition, and from doing anything or taking any action, legal or otherwise, in connection with the removal of the said mining machinery and equipment or any part thereof from the possession of the bankrupt or the trustee, or from in any way interfering with the use, operation and sale of said mining machinery and equipment by the trustee herein; and

2: an order should not be made ordering, declaring and finding that the said conditional sales contract of the said respondents, Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, respectively, are and each of them is fraudulent and void as to the lien or interest claimed by said respondents in the said mining machinery and equipment; and, [40]

3: an order should not be made ordering and finding that all payments of money made by the bankrupt to said respondents, Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, within four months prior to March 15, 1939, constitute a preference as against the other creditors of the bankrupt and determining the amount thereof; and,

4: an order should not be made granting such other and further relief as to the said court may seem proper.

And said respondents, Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, having duly and regularly filed their answer herein to said trustee's petition and it being duly and regularly stipulated by and between said petitioner and said respondents that all the testimony introduced at the hearing of January 30, 1940, upon the petition of the Committee of Creditors filed herein on September 29, 1939, may be considered as evidence introduced upon the

hearing of the said trustee's petition to the same extent and in the same manner as though originally introduced upon the hearing of the said trustee's petition, (said petition of the Committee of Creditors being a petition filed by the Committee of Creditors of Jumbo Consolidated Mining Co., a corporation, as a Debtor under Chapter XI proceedings herein alleging, among other things, that the liens and interest claimed by said respondents and each of them in and to the mining machinery and equipment and under the conditional sales contracts alleged in the trustee's petition herein are void for various reasons therein stated, to which petition reference is hereby made for further particulars); and it further appearing that the said trustee's petition was duly and regularly set down for hearing and heard on February 19, 1941; and upon the stipulation of the said trustee and said respondents, the parties hereto, duly and regularly filed, O. T. Gilbank, as Trustee of the Estate of said bankrupt, was duly and regularly substituted in the place and stead of said Hubert F. Laugharn as the petitioner in said [41] trustee's petition, said Hubert F. Laugharn having duly and regularly resigned as Trustee of said estate; and said O. T. Gilbank having been, on January 7, 1941, duly and regularly appointed and qualified and is now acting as Trustee of the estate of said bankrupt; and paragraph I of said Trustee's petition having been duly and regularly amended accordingly; and said petitioner, O. T. Gilbank, as Trus-

tee of the estate of said bankrupt, and said respondents each appearing personally and by his respective counsel at the hearing, said O. T. Gilbank, as Trustee of the estate of said bankrupt and his attorney, James H. Mitchell, appearing in support of said petition, and said respondents and each of them and their attorney, Arthur P. Shapro, appearing in opposition thereto, and oral and documentary evidence having been introduced, and the court having been fully advised, and it appearing:

1: That on March 15, 1939, Jumbo Consolidated Mining Co., a corporation, as Debtor, filed its petition under Section 322, Chapter XI of the Bankruptcy Act; and that said Jumbo Consolidated Mining Co., a corporation, was duly and regularly adjudicated a bankrupt on the 11th day of September, 1940. That on the 16th day of September, 1940, Hubert F. Laugharn was duly and regularly appointed, qualified and acted as trustee of said estate. That thereafter said Hubert F. Laugharn duly and regularly resigned as trustee of said estate whereupon said petitioner, O. T. Gilbank, was duly and regularly appointed and qualified as trustee of said estate and is now acting as such trustee.

2: That the bankrupt is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and, at all time since on or about September 1, 1937, said bankrupt has been qualified to do business, and has done and carried on business, in the State of California. That

the Articles of Incorporation of said bankrupt provide, among other things that it may conduct all corporate business of every kind and nature outside the State of Nevada. That, except for the organization [42] meeting held at Reno, Nevada, April 13, 1936, the first meeting of the bankrupt was held April 25, 1936, at 1119 Banks-Huntley Building, Los Angeles, California, at which time the Board designated the Bank of America, with offices at 660 South Spring Street, Los Angeles, as the depository for the company.

The next meeting was on October 21, 1936, at 1119 Banks-Huntley Building, pursuant to a waiver of notice stating that the meeting shall be held "at the office of said corporation in Room 1119 Banks-Huntley Building, in the City of Los Angeles, County of Los Angeles, State of California * * *".

That the minutes show that on October 22, 1936, another directors' meeting was held "in the office of the company, Room 1119 Banks-Huntley Building, in the City of Los Angeles, County of Los Angeles, State of California, * * *".

That on November 5, 1936, a directors' meeting was held pursuant to a waiver of notice stating in part that the meeting was to be held "at the office of said corporation in Room 1119 Banks-Huntley Building, in the City of Los Angeles, County of Los Angeles, State of California".

That on June 4, 1937, a special meeting of the directors was held pursuant to waiver of notice

stating in part that the meeting was to be held "at the office of said corporation, room 1119 Banks-Huntley Building, in the City of Los Angeles, County of Los Angeles, State of California".

Thereafter the bankrupt moved its office to the Bay Cities Building at Santa Monica, in the said County of Los Angeles.

On September 1, 1937, the bankrupt duly qualified to do business in this state; that the statement of the bankrupt as a foreign corporation, required by the laws of this State, was duly filed in the office of the Secretary of State of the State of California, on that date and states that "the location and address of the principal office of said corporation within the State of California is Bay Cities Building, 225 Santa Monica Boulevard, in [43] the City of Santa Monica, County of Los Angeles, State of California," and that the name of the person residing in the State upon whom process directed to said corporation may be served is W. J. Shaw, giving his address, as provided by Civil Code Section 405, to be in Los Angeles County.

That the said respondents, Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, knew that the office of the bankrupt in this State was in the County of Los Angeles, as indicated by the correspondence back and forth. The two purchase orders of Western Machinery Company (Pet. Ex. 2) dated July 14, 1938, specified 506 Bay Cities

Building, Santa Monica, California, as the main office of the bankrupt.

That the various documents, such as invoices and letters to W. J. Shaw, as president, in Exhibit 11 state the address of the bankrupt to be Bay Cities Bldg., Santa Monica, Calif.

That the conditional sales contract of August 16, 1938, with Western Machinery Company (Pet. Ex. 1) shows the address of the bankrupt to be Santa Monica, California.

That all of the books and records of the corporation have always been kept in Los Angeles County, except those required by the laws of Nevada to be kept in Reno.

That at all times since September 1, 1937, the said bankrupt has been and is now a resident of the State of California residing, and having its place of business within the State of California, in the County of Los Angeles.

3: That Western-Knapp Engineering Co., a corporation is a corporation duly organized and existing under and by virtue of the laws of the State of California.

4: That the Western Machinery Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah.

5: That sometime prior to May 23, 1938, Mr. Thyle, as the representative of Western-Knapp Engineering Co., visited the mine [44] and made a list of all the personal property owned by the bankrupt which he could find at the mining properties

of the bankrupt, which mining properties are hereinafter referred to as the Mt. King Mine. That on May 23, 1938, an instrument in writing (Res. Ex. "C") was delivered to said Western-Knapp Engineering Co., purporting to be a bill of sale conveying to said Western-Knapp Engineering Co., all of the bankrupt's right, title and interest in and to the said mining machinery and equipment then located at the Mt. King Mine and which was owned and in the possession of the bankrupt. That said property is also set forth and described in Exhibit "B" attached to and made a part of the purported contract of conditional sale dated May 23, 1938, (Pet. Ex. 6) wherein said Western-Knapp Engineering Co., a corporation, is designated as the seller and the bankrupt is designated as the buyer, and is also set forth and described in Exhibit 1 attached to and made a part of said trustee's petition to which reference is hereby made for further particulars, and is also set forth herein as Parcel One. That the only purpose of the said purported bill of sale was an attempt on the part of Western-Knapp Engineering Co., to obtain title to all the personal property owned by the bankrupt on May 23, 1938, as additional security for the payment of the property described in Exhibit "A" of said contract of conditional sale. That all of said personal property (described herein as Parcel One) has been in the possession and under the control of the bankrupt at all times since September 1, 1937.

6: That the said Mt. King Mine is located in the County of Calaveras, State of California, and is now and has been at all times since on and prior to September 1st, 1937, a mining property, operated, developed and in the possession of the bankrupt.

7: That, at the time of the said delivery of said purported bill of sale, the bankrupt had the possession and control of all said mining machinery and equipment and that said mining machinery and equipment (described herein as Parcel One) was not, on the said [45] 23rd day of May, 1938, nor at any other time or at all, delivered to said Western-Knapp Engineering Co., nor has said Western Knapp Engineering Co., ever had possession thereof, and that at all times since on and prior to May 23, 1938, the said mining machinery and equipment has remained in the possession of the bankrupt, during which time numerous persons have become and now are creditors of the bankrupt.

8: That on the said 23rd day of May, 1938, the said instrument purporting to be a contract of conditional sale (Pet. Ex. 6) was executed by said Western-Knapp Engineering Co., as seller, and the bankrupt, as buyer, wherein Western-Knapp Engineering Co., purported to sell, and the bankrupt purported to buy, under the terms and conditions thereof the mining properties and equipment described as Parcel One herein and also the said mining machinery and equipment set forth and described in Exhibit "A" attached thereto and

made a part thereof, and which is described herein as Parcel Two. That said mining machinery and equipment is also set forth and described in Exhibit 2 attached to and made a part of trustee's petition, to which reference is hereby made for further particulars.

9: That on the said 23rd day of May, 1938, a portion of said mining machinery and equipment described herein as Parcel Two was located in various counties of the State of California and certain other portions of said mining machinery and equipment were not in existence. That the description of said mining machinery and equipment described as Parcel Two herein, and the counties in which certain of said mining machinery and equipment was located, and the fact that other portions of said mining machinery and equipment were not in existence, on the said 23rd day of May, 1938, is indicated opposite the respective items of mining machinery and equipment described in Parcel Two hereof. That said contract of conditional sale was recorded May 28, 1938, in Book "U" of Agreements, at page 462, et seq., in the office of [46] the County Recorder of Calaveras County, California, but has never been recorded in the office of the County Recorder of any other county.

10: That at all times since on and after the 12th day of August, 1938, the bankrupt has had the possession and control of all that certain mining machinery and equipment more particularly set forth and described in Exhibit 3 annexed to and

made a part of said trustee's petition, to which reference is hereby made for further particulars, which mining machinery and equipment is also described herein as Parcel Three. That at no time during said period has said mining machinery and equipment, or any part thereof, been delivered to said Western Machinery Company, nor has said Western Machinery Company during any of said time had possession of said mining machinery and equipment, or any part thereof. That at all times since August 12, 1938, the said mining machinery and equipment has remained in the possession of the bankrupt, during which times numerous persons have become and now are creditors of the bankrupt. That all of the said mining machinery and equipment was ordered from the respondent, Western Machinery Company, on open account and delivered to the bankrupt during the period commencing May 19, 1938, to and including August 12, 1938, and that title thereto passed to the bankrupt at the time of such delivery.

· 11: That on the 16th day of August, 1938, a purported contract of conditional sale was executed by said Western Machinery Company, as seller, and the bankrupt, as buyer, wherein and whereby the said Western Machinery Company purported to sell, and the bankrupt purported to buy, said mining machinery and equipment described herein as Parcel Three. That said conditional sales contract was introduced in evidence herein and marked Petitioner's Exhibit 1. That said conditional sales con-

tract was recorded August 20, 1938, in Book 4 of Official Records, at page 293, et seq., in the office of the County Recorder of Calaveras County, California, but has never been recorded in the office of the [47] *the* County Recorder of any other county.

12: That various *perons*, having no actual knowledge of either of said conditional sales contracts, became creditors of the said bankrupt while the said bankrupt was in possession of said machinery and equipment.

That on April 30, 1938, the bankrupt was indebted to August P. Nelson in the amount of \$3234.50. That on May 25, 1938, \$2,000.00 was paid, leaving unpaid \$1234.52 as of May 25, 1938; that the balance due August P. Nelson May 31, 1939, was \$1932.69; that the balance on June 30, 1939, was \$2900.35; that on July 31, 1939, the balance due was \$3753.40; that on August 31, 1939, the balance due was \$4114.09, and that no payments were made by the bankrupt to August P. Nelson after May 25, 1939.

On May 23, 1938, the bankrupt owed the Limited Mutual Compensation Insurance Company \$410.56. That bankrupt is now indebted to said insurance company in excess of \$2,000.00.

That on April 30, 1938, there was owing to J. D. McCarty Estate on account of hauling \$5.48; on May 31, 1938, the balance was \$269.48; on June 30, 1938, the balance was \$549.48; on July 31, 1938, the balance was \$734.08; and in August 1938 the balance

was \$782.08. The bankrupt is still indebted to J. D. McCarty Estate.

March 5, 1937, the bankrupt became obligated to Dr. Homer J. Arnold, upon a written agreement of guarantee, in the sum of \$2700.00, no part of which has ever been paid.

On June 21, 1937, the bankrupt became obligated to Louise M. Beckmeyer upon a written obligation of guarantee in the sum of \$8,000.00, no part or portion of which has ever been paid.

That Dr. Arnold has never at any time known of the said conditional sales contracts of the respondents.

On or about June 24, 1937, the bankrupt became obligated to D. B. Robnett for professional services rendered in the sum of \$200.00; that D. B. Robnett never had any knowledge of the said conditional sales contracts of the respondents; that no part of [48] said obligation has been paid.

That on May 23, 1938, the bankrupt was indebted to the Calkins Company, and that on March 6, 1939, the bankrupt was indebted to said company in the amount of \$148.27. That no part of said \$148.27 has ever been paid; and, that said company has never had any knowledge of the said conditional sales contracts of respondents.

13: That said purported contracts of conditional sale and said purported conveyances are fraudulent and therefore void as against the trustee in bankruptcy herein.

14: That said Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, have threatened to proceed with the foreclosure of said purported contracts of conditional sale and remove the said mining machinery and equipment from the place of its present location at the Mt. King Mine in Calaveras County. That the removal of said mining machinery and equipment would prevent the said trustee from making a satisfactory sale of the property and assets of the bankrupt. That the said mining machinery and equipment constitutes the main assets of the bankrupt and is a very valuable asset of the bankrupt. That great and irreparable injury and damage would be done to this estate if said Western-Knapp Engineering Co., and Western Machinery Company were permitted to remove the same from its present location or in any way interfere therewith.

15: That the allegations of paragraph XIV of said Trustee's petition are unproven except that it appears that within four months prior to March 15, 1939, the bankrupt paid to said Western-Knapp Engineering Co., and said Western Machinery Company \$10,000.00 for or on account of the purchase price of the mining machinery and equipment described as Parcels Two and Three herein.

16: That each of the allegations set forth and alleged in the said Answer of the respondents is either untrue or unproven except as herein found to be true. [49]

Now, upon application of James H. Mitchell, of the firm of Mitchell, Johnson & Ludwick, attorneys for said O. T. Gilbank, as trustee of the estate of Jumbo Consolidated Mining Co., a corporation, Bankrupt, it is

Ordered that the said Bill of Sale and the said Contract of Conditional Sale dated May 23, 1938, and recorded May 28, 1938, in Book "U" of Agreements, page 462, et seq., in the office of the County Recorder of Calaveras County, and the said Contract of Conditional Sale dated August 16th, 1938, and recorded August 20th, 1938, in Book 4 of Official Records at page 293, et seq., in the office of the County Recorder of Calaveras County, and the Contract of Conditional Sale dated July 26, 1938, and recorded August 2, 1938, in Book "U" of Agreements at page 485, et seq., in the office of the County Recorder of Calaveras County, are, and each of them is, fraudulent and void as to the lien or interest claimed by said respondents and each of them in and to the said mining machinery and equipment of the bankrupt, and that neither of the said respondents has any right, title or interest therein, nor to any part thereof, except as a general unsecured creditor herein. That said mining machinery and equipment is more particularly described as follows:

Parcel One:

- 1—5x5 Marcy Ball Mill, #397, with V-belt drive and 60 HP motor, complete with sheave, slide rails and compensator.
- 3—Fagergren Flotation Machines, size 11-s, Type Std. Square, 720 RPM, Serial Nos. 21, 22 & 23.
- 2—Fagergren Flotation Machines, size 36x9, Type Std. Square, 600 RPM, one Serial No. 322, no number other machine.
- 1—Fagergren Flotation Machine, size 9-S Type Std. Square, 900 RPM, Serial No. S-51.
- 1—54" Duplex Dorr Classifier, with motor and V-belt drive, classifier Serial No. 1275D.
- 1—18x18 Pan American Jig, Type AC, No. 271.

[50]

- 1—Hoist Motor, Westinghouse Oil Well Motor, varying speed, 75 HP, 440 volts, 50/60 cycle, 3 phase, style 21C482, Frame 752, 90 Amps, 970-1160 RPM, full load, Serial #4501040.
- 1—Westinghouse Controller, Frame 50, Style S020 E171.

Parcel Two:

**Counties in
which located
5-23-38**

- 1—22x13x16 Ingersoll-Rand, Imperial Type, 2 stage, Air Compressor, complete with 200 HP, General Electric, 440 volt, 3 phase, 60 cycle motor, furnished with sheave and 13 V-belts, complete with sliding base and compensator. Mariposa
- 1—100 H.P. Double Drum Ottumwa Iron Works Mine Hoist, complete with 100 H.P., 440 volt, 3 phase, 60 cycle, variable speed motor complete with resistance grids and drum controller. State of
Utah
- 1—Taper Bar Grizzly. Non-ex-
istent
- 1—15x38 Wheeling Jaw Crusher with V-belt drive and 75 HP, 440 volt, 3 phase, 60 cycle motor, with sliding base and compensator. Sacramento

Counties in
which located
5-23, 38

1—16" Belt Conveyor with magnetic pulley and motor generator set.	Calaveras
1—4x5 Leahy Vibrating Screen.	Calaveras
1—2'4" Type TY Traylor Secondary Crusher, complete with 75 HP, 440 volt, 3 phase 60 cycle motor, with sliding base, V-belt drive and compensator	Non-existent
1—8x5 Bucket Elevator, 40' centers, with gear head, motor and drive	Calaveras
1—16" Adjustable Speed Belt Feeder, with 16" conveyor to present ball mill with motor and drive.	Non-existent
1—Adjustable Speed Belt Feeder for new ball mill with motor and drive.	Non-existent
1—6x8 Hendy Overflow Ball Mill, with motor and V-belt drive.	Calaveras
1—6'x23'4" Model BHM Wemco Classifier with variable speed drive and U. S. Motor	Tuolumne
1—26"x26", 2-cell, Bendelari Jig.	Calaveras
1—3" Wilfley type pump with 7½ HP motor and drive.	Non-existent
4—44" Fagergren Flotation Cells, motor driven, with reagent feeders.	Tuolumne
1—16'x8' Thickener Tank, complete with low head superstructure, motor, mechanism, overflow launder and sills; 2 inch diaphragm pump complete with motor and driver.	Non-existent

[51]

1—4', 3 disc New American Type Filter.	Arizona
1—Deister-Plato Concentrating Table, with motor and drive.	Non-existent

Parcel Three:

- 1—Pantograph—Ratio $15\frac{1}{2}$ to 1
1508'4"—1" Standard Black Pipe
- 4—50' lengths, $\frac{3}{4}$ " Air Hose, complete with couplings
- 4—50' lengths, $\frac{3}{4}$ " Air Hose, complete with couplings
- 5—50' lengths, Water Hose, complete with couplings
- 1—400 Amp. Style 918-153, Type ABI, 3 pole, 600 volt, West-
inghouse Circuit Breaker
- 1—600 Amp. Style 918-157, Type ABI, 3 pole, 600 volt, West-
inghouse Circuit Breaker
- 1—2"MRV25, Ingersoll-Rand Cameron Motor Pump, with
cross-the-line starter, magnetic push button, over and un-
der voltage protection, suction and discharge flanges.
- 1—50 cu. ft. 28" gauge, Roller Bearings Ore Skip
- 1—type 6 HC, Ingersoll-Rand, double drum, Air Hoist
- 2—HNN-1-J, Ingersoll-Rand, double drum, Air Hoists, Se-
rials Nos. 306 & 379-S @ 820.00
- 3—WEMCo Slip Scrapers, with bridles @ 150.00
- 1—No. 5, Ingersoll-Rand Drill Sharpener, complete with ac-
cessories for 1" quarter octagon steel, Serial No. 1625,
IRLP shank & bit punch and late type hammer cylinder
- 6—24 cu. ft., 18" gauge, roller bearing, Greene Side Dump
Ore Cars @ 145.00
- 4—DA30 Ingersoll-Rand Air Drifters, Serial Nos. 456570,
457918, 457884, & 457923 @ 390.00
- 1—SAR-120, Ingersoll-Rand Stoper with 1" quarter octagon
chuck, Serial No. 442018
- 3— $3\frac{1}{2}$ "x7' Columns complete @ 60.00
- 2—Column Clamps @ 3.10
- 2—#1167 Chuck Wrenches @ 3.00
- 3— $3\frac{1}{2}$ " Column Arms @ 21.00
- 2— $3\frac{1}{2}$ " Saddles @ 21.00

and it is further

Ordered that said respondents are, and each of them is, hereby forever barred and resrtained from proceeding with the [52] foreclosure of, or asserting any right, title or interest in or to said mining machinery and equipment under, the said conditional sales contracts, or either of them, or from doing anything or taking any action, legal or otherwise, in connection with the removal of said mining machinery and equipment from the possession of the bankrupt, or the trustee, or from in any way interfering with the use, operation and sale of the said mining machinery and equipment by the trustee herein; and it is further

Ordered that the title in and to the said mining machinery and equipment is hereby quieted in the trustee in bankruptcy herein, and that said respondents are, and each of them is hereby permanently enjoined and restrained from asserting any claim of any kind or nature in or to the said mining machinery and equipment or any part thereof; and it is further

Ordered that the said trustee is hereby authorized to institute such a proceeding as may be proper in a court of competent jurisdiction with respect to the payments of money made by the bankrupt to said respondents within four months prior to March 15, 1939.

HUGH L. DICKSON

Referee

Approved as to Form

.....
Attorney for the Western Knapp Engineering Co., a corporation; Western Machinery Company, a corporation.

[Endorsed]: Filed Jun. 6, 1941. Hugh L. Dickson, Referee. Filed Aug. 22, 1941. R. S. Zimmerman, Clerk. [53]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME OF RESPONDENTS TO FILE PETITION FOR REVIEW OF REFEREE'S ORDER GRANTING TRUSTEE'S PETITION TO RECOVER ASSETS FRAUDULENTLY OR PREFERENTIALLY TRANSFERRED BY BANKRUPT AND TO AVOID LIEN

Hon. Hugh L. Dickson, having heretofore and on the 9th day of April, 1941, signed and filed herein his Memorandum Opinion upon the issues raised by the Trustee's Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien, and the Answer thereto filed herein by Respondents, Western Machinery Company, a corporation, and Western-Knapp Engineering Co., a corporation, in which the attorneys for the Trustee are directed to prepare an appropriate formal order; and good cause appearing therefor, Now, upon motion of Arthur P. Shapro, Esq., attorney for said Respondents;

It Is Hereby Ordered that the time within which said Respondents, or either of them, may file herein their petition or petitions for a review of the order granting said Trustee's Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien, be and the same is hereby extended for a period of twenty days from and after the service, by mail, upon said attorney for said Respondents, at his office, 420 Russ Building, San Francisco, California, of a duly certified copy of the formal order to be hereafter signed [54] and filed by said Referee in Bankruptcy thereon.

Dated at Los Angeles, in said District, this 11th day of April, 1941.

HUGH L. DICKSON

Referee in Bankruptcy

[Endorsed]: Filed Apr. 11, 1941.

[Endorsed]: Filed Feb. 13, 1942. Hugh L. Dickson, Referee. Filed Feb. 13, 1942. R. S. Zimmerman, Clerk. [55]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER GRANTING PETITION TO RE-
COVER ASSETS FRAUDULENTLY OR
PREFERENTIALLY TRANSFERRED BY
BANKRUPT AND TO AVOID LIEN

Comes now Western-Knapp Engineering Co., a corporation, and respectfully represents:

That heretofore, and on the 6th day of June, 1941, Hon. Hugh L. Dickson, Referee in Bankruptcy herein, made, and on said date signed and filed herein, that certain Order granting said Petition to Recover Assets Fraudulently or Preferentially [56] Transferred by Bankrupt and to Avoid Lien, a true copy of which is hereto annexed, marked Exhibit "A", and hereby expressly referred to and made part hereof, wherein and whereby the claim of title and interest of your Petitioner in and to certain personal property more particularly in said Order described as "Parcel One" and "Parcel Two", was found and determined by said Referee to be fraudulent and void as against O. T. Gilbank, the duly appointed, qualified and acting Trustee of the estate of the Bankrupt above-named.

That thereafter, and on the 3rd day of July, 1941, your Petitioner was duly served with the aforesaid Referee's Order, dated the said 6th day of June, 1941, in the manner and in accordance with that certain Order Extending Time of Re-

spondents to File Petition for Review of Referee's Order Granting Trustee's Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien, theretofore made and entered herein by said Referee on the 11th day of April, 1941.

That the aforesaid Referee's Order, so signed and filed herein on the said 6th day of June, 1941, was so made by said Referee upon said Trustee's Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien, after a hearing had upon said Petition by said Referee on the 19th day of February, 1941, and after the consideration of briefs theretofore submitted to said Referee by counsel for the respective parties.

A. That the aforesaid Referee's Order, dated the said 6th day of June, 1941, in so far as it refers to, applies to, and grants said Trustee's Petition with respect to each and all of the personal property described in and as "Parcel Two" of said Order, was and is erroneous and contrary to law, and, more [57] particularly,

(1) That said Referee's Order (to the foregoing extent) is not supported by, and is contrary to, the evidence adduced by said Trustee and by your Petitioner upon the hearing of said Trustee's Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien.

(2) That the evidence adduced by said Trustee in support of his said Petition was and is insufficient to warrant the relief therein prayed for and/or thereafter granted to said Trustee by the aforesaid Referee's Order (to the foregoing extent), dated, as aforesaid, the 6th day of June, 1941.

(3) That the aforesaid evidence, so adduced by said Trustee and by your Petitioner upon the hearing of said Trustee's Petition, shows affirmatively and without contradiction that said Bankrupt was, at all of the times therein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and at all times since on or about the 1st day of September, 1937, was qualified to and did carry on business as such foreign corporation in the State of California, and that, by reason of the premises and of all of the evidence so adduced upon the issues so raised by your Petitioner's Answer to said Trustee's Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien, said Bankrupt was, at the time of the execution of the Contract of Conditional Sale between said Bankrupt and your Petitioner, dated May 23, 1938, and recorded May 28, 1938, in Book "U" of Agreements, at page 462 et seq., in the office of the County Recorder of Calaveras County, California, and of the Supplemental Agreement on Conditional Sale, likewise between said Bankrupt and your Petitioner and of even date therewith, a foreign corporation and a non-resident of the State of

California, within [58] the meaning of Section 2980 of the Civil Code of California.

(4) That the evidence so adduced by the respective parties upon the aforesaid issues, likewise by reason of the premises, shows affirmatively that the aforesaid and above-described Contract of Conditional Sale and Supplemental Agreement thereon between said Bankrupt and your Petitioner, as aforesaid, were properly and timely and duly recorded in compliance with and in accordance with the terms and conditions of the aforesaid Section 2980 of the said Civil Code of California; and that, in all respects, said Contract of Conditional Sale, and all of the rights and privileges therein granted to your Petitioner, were and are valid, enforceable, and subsisting, both as against the Bankrupt above-named and as against the aforesaid Trustee of said Bankrupt's estate.

B. That the aforesaid Referee's Order, dated the 6th day of June, 1941, in so far as it provides, as follows:

"That the said Trustee is hereby authorized to institute such a proceeding as may be proper in a court of competent jurisdiction with respect to the payments of money made by the Bankrupt to said Respondents within four months prior to March 15, 1939."

was and is erroneous and contrary to law, in that said provision of said Order is contrary to the evidence adduced by the respective parties upon the

hearing of said Trustee's Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien, and is inconsistent with and contrary to Finding No. 15 set forth and contained in said Referee's Order, commencing on line 27 and ending on line 32 of page 10 thereof.

Wherefore, your Petitioner prays that the aforesaid Referee's Order granting said Trustee's Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to [59] Avoid Lien, dated and filed herein on the said 6th day of June, 1941, may be, by the Judge of the above-entitled Court, in so far as it relates and refers to each and all of the personal property more particularly described in and as "Parcel Two" of said Order, reviewed, pursuant to the provisions of Section 39c of the Acts of Congress Relating to Bankruptcy, and that such Order, to that extent, may be thereafter, by the said Judge of this Court, reversed, and that said Referee be, by said Judge of this Court, directed to enter, with respect to said personal property so described as "Parcel Two" of said Referee's Order, an Order denying said Trustee's Petition with respect thereto, and establishing the validity of your Petitioner's claims thereto, in accordance with the prayer of your Petitioner's Answer to said Trustee's Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien, theretofore filed herein; and for an Order similarly reviewing and reversing the aforesaid Referee's

Order, dated and filed herein on the said 6th day of June, 1941, in so far as said Order provides, as follows:

“That the said Trustee is hereby authorized to institute such a proceeding as may be proper in a court of competent jurisdiction with respect to the payments of money made by the Bankrupt to said Respondents within four months prior to March 15, 1939.”

Or for such other, further and different order or relief as to this Honorable Court may seem just in the premises.

WESTERN-KNAPP ENGINEER-
ING CO.

By H. N. HOW,

President.

ARTHUR P. SHAPRO,

Attorney for Petitioner on Review. [60]

United States of America,
Northern District of California—ss.
City and County of San Francisco—ss.

H. N. How, being duly sworn, deposes and says:

That he is an officer, to wit, President of Western-Knapp Engineering Co., a corporation, the Petitioner named in the foregoing Petition, and as such is duly authorized to and does make this verification on behalf of said corporation.

That he has read said Petition and knows the contents thereof, and that the same is true of his

own knowledge, except as to those matters therein alleged on information or belief, and as to such matters he believes it to be true.

H. N. HOW

Subscribed and sworn to before me this 21st day of July, 1941.

[Seal]

LOUIS WIENER,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Jul. 22, 1941. Hugh L. Dickson, Referee. Filed Aug. 22, 1941. R. S. Zimmerman, Clerk. [61]

[Title of District Court and Cause.]

CERTIFICATE BY REFEREE
TO JUDGE

I, Hugh L. Dickson, one of the Referees of said Court, do hereby certify that in the course of proceedings in said cause before me, upon the hearing of the Petition of Hubert F. Laugharn, as trustee of the estate of Jumbo Consolidated Mining Co., a corporation, bankrupt, verified the 17th day of October, 1940, and filed, (O. T. Gilbank, as trustee of the estate of said bankrupt upon stipulation of the parties herein being duly and regularly substituted in the place and stead of said Hubert F. Laugharn as such petitioner, said Hubert F. Laugharn, having duly and regularly resigned as trustee of said estate), and the Answer thereto of

Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, verified the 12th day of December, 1940, and filed, the following questions were presented upon which a petition for review has been filed:

Questions Presented in Petition and on Review

1. During the period mentioned in said petition, did the bankrupt reside in the County of Los Angeles, as the term is used in Civil Code Section 2980, so as to require the recording of the conditional sales contract of Western-Knapp Engineering Co., in the County of Los Angeles?

(Respondent, Western Machinery Company, by failing to file its petition for review admits the correctness of the order of the Referee with respect to its contract of conditional sale.)

(The Western-Knapp Engineering Company has not raised any question in its petition for review with respect to the correctness of the portion of the Referee's order concerning the property described in the Order as Parcel One (which is the same [62] property described as Exhibit 1 in the said petition and in Exhibit "B" attached to the contract of conditional sale of Western-Knapp Engineering Co.).)

(The only other property involved in this proceeding and in the petition of Western-Knapp Engineering Co. on review is the property described in the Order as Parcel Two (which is the same property described in Exhibit 2 in the said petition

and in Exhibit "A" attached to the contract of conditional sale of Western-Knapp Engineering Co.).)

2. Has the Referee in this proceeding the authority to authorize the trustee herein "to institute such a proceeding as may be proper in a court of competent jurisdiction with respect to the payment of money made by the bankrupt to said respondents within four months prior to March 15, 1939"?

History of Litigation as Disclosed from the File

On September 29, 1939, the Committee of Creditors of Jumbo Consolidated Mining Company, a corporation, a Debtor under Chapter XI proceedings, (Jumbo Consolidated Mining Co., a corporation, was on September 11, 1940, adjudicated a bankrupt and therefore said corporation is referred to herein as "the bankrupt"), filed a petition alleging, among other things, that the liens and interest claimed by Western-Knapp Engineering Co., and Western Machinery Company, the respondents herein, in and to certain mining machinery and equipment, under the conditional sales contracts, are void for various reasons therein stated, and asked for an order requiring said companies to show cause why they should not be restrained "from proceeding with the foreclosure of the rights of this estate in and to the machinery and equipment" described in said contracts.

An order to show cause was issued September 29, 1939, upon said petition.

On January 25, 1940, answers were filed separately by each of said two companies. [63]

On January 30, 1940, the case was partially heard before Referee Samuel W. McNabb, and was then continued so that the petitioner could present such further rebuttal evidence as may be proper, and thereafter continued upon stipulation and request of both parties.

On September 11, 1940, Jumbo Consolidated Mining Co., a corporation, Debtor, was adjudged a bankrupt herein. Hubert F. Laugharn was appointed trustee.

On November 28, 1940, pursuant to written stipulation, a new petition was filed by Hubert F. Laugharn, as trustee for the said bankrupt, to recover assets fraudulently or wrongfully transferred by the bankrupt and to avoid liens claimed by Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, and an order to show cause upon the said trustee's petition was issued wherein said Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation were required to show cause why

(1) An order should not be made and entered herein restraining the said respondents and each of them from proceeding with the foreclosure of the purported contracts of conditional sale referred to in said petition with respect to the mining ma-

chinery and equipment described in said petition, and from doing anything or taking any action, legal or otherwise, in connection with the removal of the said mining machinery and equipment or any part thereof from the possession of the bankrupt or the trustee, or from in any way interfering with the use, operation and sale of said mining machinery and equipment by the trustee herein; and,

(2) An order should not be made ordering, declaring and finding that the said conditional sales contract of the said respondents, Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, respectively, are and each of them is fraudulent and void as to the lien or interest claimed by said respondents in the said mining machinery and [64] equipment; and,

(3) An order should not be made ordering and finding that all payments of money made by the bankrupt to said respondents, Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, within four months prior to March 15, 1939, constitute a preference as against the other creditors of the bankrupt and determining the amount thereof, and,

(4) An order should not be made granting such other and further relief as to the said court may seem proper.

Said stipulation also provided that all testimony introduced at the hearing of January 30, 1940,

upon the petition of the Committee of Creditors may be considered as evidence introduced upon the hearing of the said trustee's petition to the same extent and to the same manner as though originally introduced upon the hearing of the said trustee's petition.

On December 13, 1940, the answer of Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, to the said trustee's petition was filed herein.

This matter was finally heard on February 19, 1941, at which time, by written stipulation duly filed, O. T. Gilbank, who had been duly appointed trustee for the bankrupt on January 7, 1941, was substituted in the place and stead of Hubert F. Laugharn, as the petitioner in said petition, and paragraph I of said petition was amended accordingly.

Summary of Evidence

The following is a summary of the evidence material to the issues presented on review as adduced at said hearing:

The bankrupt is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and at all times since September 1, 1937, has been qualified to do business, and has done and carried on business, in the State of California.

Paragraph Second of the Articles of Incorporation (Petitioner's Exhibit 8) provides that the

principal office of the corporation in NEVADA is in the City of Reno,

“but that this corporation may maintain an office or offices in such other place or places, within or without the State of Nevada, as may from time to time be designated by the Board [65] of Directors or by the By-Laws of this corporation, and that this corporation may conduct all corporate business of every kind and nature, including the holding of meetings of directors and stockholders, outside the State of Nevada, the same as though conducted within the State of Nevada.”

Except for the organization meeting held at Reno April 13, 1936, the first meeting of the bankrupt was held April 25, 1936, at 1119 Banks-Huntley Building, Los Angeles, California, at which time the Board designated the Bank of America, with offices at 660 South Spring Street, Los Angeles, as the depository for the company. (Testimony of W. J. Shaw 2-19-41)

The next meeting was on October 21, 1936, at 1119 Banks-Huntley Building, pursuant to a waiver of notice stating that the meeting shall be held “at the office of said corporation in room 1119 Banks-Huntley Building, in the City of Los Angeles, County of Los Angeles, State of California . . .”. (Testimony of W. J. Shaw 2-19-41).

That the minutes show that on October 22, 1936, another director’s meeting was held “in the office

of the company, room 1119 Banks-Huntley Building, in the City of Los Angeles, County of Los Angeles, State of California . . .". (Testimony of W. J. Shaw 2-19-41)

That on November 5, 1936, a directors' meeting was held pursuant to a waiver of notice stating in part that the meeting was to be held "at the office of said corporation in room 1119 Banks-Huntley Building, in the City of Los Angeles, County of Los Angeles, State of California". (Testimony of W. J. Shaw 2-19-41).

That on June 4, 1937, a special meeting of the directors was held pursuant to waiver of notice stating in part that the meeting was to be held "at the office of said corporation, room 1119 Banks-Huntley Building, in the City of Los Angeles, County of Los Angeles, State of California". (Testimony of W. J. Shaw 2-19-41).

That thereafter the bankrupt moved its office to the Bay Cities Building at Santa Monica.

On September 1, 1937, the bankrupt qualified to do business in this State. The statement of the bankrupt as a foreign corporation required by the laws of this State, was filed in the office [66] of the Secretary of State of the State of California, on that date and states that "the location and address of the principal office of said corporation within the State of California is Bay Cities Building, 225 Santa Monica Boulevard, in the City of Santa Monica, County of Los Angeles, State of

California," and that the name of the person residing in the State upon whom process directed to said corporation may be served is W. J. Shaw, giving his address, as provided by Civil Code Section 405, to be in Los Angeles County. (See Petitioner's Exhibit 7).

That the said respondents, Western-Knapp Engineering Company, a corporation, and Western Machinery Company, a corporation, knew that the office of the bankrupt in this State was in the County of Los Angeles, as indicated by the correspondence back and forth. The two purchase orders of Western Machinery Company (Exhibit 2) dated July 14, 1938, specified 506 Bay Cities Building, Santa Monica, California, as the main office of the bankrupt.

The various documents, such as invoices and letters to W. J. Shaw, as president, in Exhibit 11 state the address of the bankrupt to be Bay Cities Bldg., Santa Monica, Calif.

The conditional sales contract of August 16, 1938, with Western Machinery Company (Exhibit 1) shows the address of the bankrupt to be Santa Monica, California.

All of the books and records of the corporation have always been kept in Los Angeles County, except those required by the laws of Nevada to be kept in Reno. (Testimony of W. J. Shaw, 2-19-41)

Testimony of H. K. Hill:

That on April 30, 1938, the bankrupt was indebted to August P. Nelson in the amount of

\$3234.50. That on May 25, 1938, \$2000.00 was paid, leaving unpaid \$1234.52 as of May 25, 1938; that the balance due August P. Nelson May 31, 1939, was \$1932.69; that the balance on June 30, 1939, was \$2900.35; that on July 31, 1939, the balance due was \$3753.40; that on August 31, 1939, the balance due was \$4114.09, and that no payments were made by the [67] bankrupt to August P. Nelson after May 25, 1939.

On May 23, 1938, the bankrupt owed the Limited Mutual compensation Insurance Company \$410.56. That bankrupt is now indebted to said insurance company in excess of \$2,000.00.

That on April 30, 1938, there was owing to J. D. McCarty Estate on account of hauling \$5.48; on May 31, 1938, the balance was \$269.48; on June 30, 1938, the balance was \$549.48; on July 31, 1938, the balance was \$734.08; and in August 1938 the balance was \$782.08. The bankrupt is still indebted to J. D. McCarty Estate.

Testimony of Dr. Homer J. Arnold:

March 5, 1937, the bankrupt became obligated to Dr. Homer J. Arnold, upon a written agreement of guarantee, in the sum of \$2700.00, no part of which has ever been paid.

On June 21, 1937, the bankrupt became obligated to Louise M. Beckmeyer upon a written obligation of guarantee in the sum of \$8,000.00, no part or portion of which has ever been paid.

That Dr. Arnold has never at any time known of the said conditional sales contracts of the respondents.

Testimony of D. B. Robnett:

On or about June 24, 1937, the bankrupt became obligated to D. B. Robnett for professional services rendered in the sum of \$200.00; that D. B. Robnett never had any knowledge of the said conditional sales contracts of the respondents; that no part of said obligation has been paid.

(Petitioner's Exhibit No. 9 is an itemized statement for professional services rendered by D. B. Robnett totalling \$200.00).

Testimony of Mr. Hussung:

Mr. Hussung testified that he is the Credit Manager for The Calkins Company; that on May 23, 1938, the bankrupt was indebted to The Calkins Company, and that on March 6, 1939, the bankrupt was indebted to his company in the amount of \$148.27. That no part of said \$148.27 has ever been paid; and, that neither he or his company has ever had any knowledge of the said condi- [68]
tional sales contracts of respondents.

(Petitioner's Exhibit No. 10 is a statement of The Calkins Company showing the amount now unpaid).

Reference to the claims in the file will show numerous persons who became creditors of the bankrupt while the bankrupt was in possession of said machinery and equipment.

FINDINGS

Upon considering all the evidence, including the foregoing, I made the following findings:

1. That on March 15, 1939, Jumbo Consolidated Mining Co., a corporation, as Debtor, filed its petition under Section 322, Chapter XI of the Bankruptcy Act; and that said Jumbo Consolidated Mining Co., a corporation, was duly and regularly adjudicated a bankrupt on the 11th day of September, 1940. That on the 16th day of September, 1940, Hubert F. Laugharn was duly and regularly appointed, qualified and acted as trustee of said estate. That thereafter said Hubert F. Laugharn duly and regularly resigned as trustee of said estate whereupon said petitioner, O. T. Gilbank, was duly and regularly appointed and qualified as trustee of said estate and is now acting as such trustee.

2. That the bankrupt is a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and, at all times since on or about September 1, 1937, said bankrupt has been qualified to do business, and has done and carried on business, in the State of California. That the Articles of Incorporation of said bankrupt provide, among other things, that it may conduct all corporate business of every kind and nature outside the State of Nevada. That, except for the organization meeting held at Reno, Nevada, April 13, 1936, the first meeting of the bankrupt was held April 25, 1936, at 1119 Banks-Huntley

Building, Los Angeles, California, at which time the Board designated the Bank of America, with offices at 660 South Spring Street, Los Angeles, as the depository for the company. [69]

The next meeting was on October 21, 1936, at 1119 Banks-Huntley Building, pursuant to a waiver of notice stating that the meeting shall be held "at the office of said corporation in Room 1119 Banks-Huntley Building, in the City of Los Angeles, County of Los Angeles, State of California . . .".

That the minutes show that on October 22, 1936, another directors' meeting was held "in the office of the company, Room 1119 Banks-Huntley Building, in the City of Los Angeles, County of Los Angeles, State of California . . .".

That on November 5, 1936, a director's meeting was held pursuant to a waiver of notice stating in part that the meeting was to be held "at the office of said corporation in Room 1119 Banks-Huntley Building, in the City of Los Angeles, County of Los Angeles, State of California".

That on June 4, 1937, a special meeting of the directors was held pursuant to waiver of notice stating in part that the meeting was to be held "at the office of said corporation, room 1119 Banks-Huntley Building, in the City of Los Angeles, County of Los Angeles, State of California".

Thereafter the bankrupt moved its office to the Bay Cities Building at Santa Monica, in the said County of Los Angeles.

On September 1, 1937, the bankrupt duly qualified to do business in this state; that the statement of the bankrupt as a foreign corporation, required by the laws of this State, was duly filed in the office of the Secretary of State of the State of California, on that date and states that "the location and address of the principal office of said corporation within the State of California is Bay Cities Building, 225 Santa Monica Boulevard, in the City of Santa Monica, County of Los Angeles, State of California", and that the name of the person residing in the State upon whom process directed to said corporation may be served is W. J. Shaw, giving his address, as provided by Civil Code Section 405, to be in Los Angeles County. [70]

That the said respondents, Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, knew that the office of the bankrupt in this State was in the County of Los Angeles, as indicated by the correspondence back and forth. The two purchase orders of Western Machinery Company (Pet. Ex. 2) dated July 14, 1938, specified 506 Bay Cities Building, Santa Monica, California, as the main office of the bankrupt.

That the various documents, such as invoices and letters to W. J. Shaw, as president, in Exhibit 11, state the address of the bankrupt to be Bay Cities Bldg., Santa Monica, Calif.

That the conditional sales contract of August 16, 1938, with Western Machinery Company (Pet. Ex

1) shows the address of the bankrupt to be Santa Monica, California.

That all of the books and records of the corporation have always been kept in Los Angeles County, except those required by the laws of Nevada to be kept in Reno.

That at all times since September 1, 1937, the said bankrupt has been and is now a resident of the State of California residing, and having its place of business within the State of California, in the County of Los Angeles.

3. That Western-Knapp Engineering Co., a corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of California.

4. That the Western Machinery Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah.

5. That sometime prior to May 23, 1938, Mr. Thyle, as the representative of Western-Knapp Engineering Co., visited the mine and made a list of all the personal property owned by the bankrupt which he could find at the mining properties of the bankrupt, which mining properties are hereinafter referred to as the Mt. King Mine. That on May 23, 1938, an instrument in writing (Res. Ex. "C") was delivered to said Western-Knapp Engineering Co., purporting to [71] be a bill of sale conveying to said Western-Knapp Engineering Co., all of the bankrupt's right, title and interest in and to the said mining machinery and equipment then located at

the Mt. King Mine and which was owned and in the possession of the bankrupt. That said property is also set forth and described in Exhibit "B" attached to and made a part of the purported contract of conditional sale dated May 23, 1938, (Pet. Ex. 6) wherein said Western Knapp Engineering Co., a corporation, is designated as the seller and the bankrupt is designated as the buyer, and is also set forth and described in Exhibit 1 attached to and made a part of said trustee's petition to which reference is hereby made for further particulars, and is also set forth herein as Parcel One. That the only purpose of the said purported bill of sale was an attempt on the part of Western-Knapp Engineering Co., to obtain title to all the personal property owned by the bankrupt on May 23, 1938, as additional security for the payment of the property described in Exhibit "A" of said contract of conditional sale. That all of said personal property (described herein as Parcel One) has been in the possession and under the control of the bankrupt at all times since September 1, 1937.

6. That the said Mt. King Mine is located in the County of Calaveras, State of California, and is now and has been at all times since on and prior to September 1st, 1937, a mining property, operated, developed and in the possession of the bankrupt.

7. That, at the time of the said delivery of said purported bill of sale, the bankrupt had the possession and control of all said mining machinery and equipment and that said mining machinery and

equipment (described herein as Parcel One) was not, on the said 23d day of May, 1938, nor at any other time or at all, delivered to said Western-Knapp Engineering Co., nor has said Western-Knapp Engineering Co., ever had possession thereof, and that at all times since on and prior to May 23, 1938, the said mining machinery and equipment has remained in the possession of the [72] bankrupt, during which time numerous persons have become and now are creditors of the bankrupt.

8. That on the said 23d day of May, 1938, the said instrument purporting to be a contract of conditional sale (Pet. Ex. 6) was executed by said Western-Knapp Engineering Co., as seller, and the bankrupt, as buyer, wherein Western-Knapp Engineering Co., purported to sell, and the bankrupt purported to buy, under the terms and conditions thereof the mining properties and equipment described as Parcel One herein and also the said mining machinery and equipment set forth and described in Exhibit "A" attached thereto and made a part thereof, and which is described herein as Parcel Two. That said mining machinery and equipment is also set forth and described in Exhibit 2 attached to and made a part of trustee's petition, to which reference is hereby made for further particulars.

9. That on the said 23d day of May, 1938, a portion of said mining machinery and equipment de-

scribed herein as Parcel Two was located in various counties of the State of California and certain other portions of said mining machinery and equipment were not in existence. That the description of said mining machinery and equipment described as Parcel Two herein, and the counties in which certain of said mining machinery and equipment was located, and the fact that other portions of said mining machinery and equipment were not in existence, on the said 23d day of May, 1938, is indicated opposite the respective items of mining machinery and equipment described in Parcel Two hereof. That said contract of conditional sale was recorded May 28, 1938, in Book "U" of Agreements, at page 462, et seq., in the office of the County Recorder of Calaveras County, California, but has never been recorded in the office of the County Recorder of any other county.

10. That at all times since on and after the 12th day of August, 1938, the bankrupt has had the possession and control of all that certain mining machinery and equipment more particularly [73] set forth and described in Exhibit 3 annexed to and made a part of said trustee's petition, to which reference is hereby made for further particulars, which mining machinery and equipment is also described herein as Parcel Three. That at no time during said period has said mining machinery and equipment, or any part thereof, been delivered to said Western-Machinery Company, nor has said

Western Machinery Company during any of said time had possession of said mining machinery and equipment, or any part thereof. That at all times since August 12, 1938, the said mining machinery and equipment has remained in the possession of the bankrupt, during which times numerous persons have become and now are creditors of the bankrupt. That all of the said mining machinery and equipment was ordered from the respondent Western Machinery Company, on open account and delivered to the bankrupt during the period commencing May 19, 1938, to and including August 12, 1938, and that title thereto passed to the bankrupt at the time of such delivery.

11. That on the 16th day of August, 1938, a purported contract of conditional sale was executed by said Western Machinery Company, as seller, and the bankrupt, as buyer, wherein and whereby the said Western Machinery Company purported to sell, and the bankrupt purported to buy, said mining machinery and equipment described herein as Parcel Three. That said conditional sales contract was introduced in evidence herein and marked petitioner's Exhibit 1. That said conditional sales contract was recorded August 20, 1938, in Book 4 of Official Records, at page 293, et seq., in the office of the County Recorder of Calaveras County, California, but has never been recorded in the office of the County Recorder of any other county.

12. That various persons, having no actual knowledge of either of said conditional sales con-

tracts, became creditors of the said bankrupt while the said bankrupt was in possession of said machinery and equipment.

That on April 30, 1938, the bankrupt was indebted to August [74] P. Nelson in the amount of \$3234.50. That on May 25, 1938, \$2,000.00 was paid, leaving unpaid \$1234.52 as of May 25, 1938; that the balance due August P. Nelson May 31, 1939, was \$1932.69; that the balance on June 30, 1939, was \$2900.35; that on July 31, 1939, the balance due was \$3753.40; that on August 31, 1939, the balance due was \$4114.09, and that no payments were made by the bankrupt to August P. Nelson after May 25, 1939.

On May 23, 1938, the bankrupt owed the Limited Mutual Compensation Insurance Company \$410.56. That bankrupt is now indebted to said insurance company in excess of \$2,000.00.

That on April 30, 1938, there was owing to J. D. McCarty Estate on account of hauling \$5.48; on May 31, 1938, the balance was \$269.48; on June 30, 1938, the balance was \$549.48; on July 31, 1938, the balance was \$734.08; and in August 1938 the balance was \$782.08. The bankrupt is still indebted to J. D. McCarty Estate.

March 5, 1937, the bankrupt became obligated to Dr. Homer J. Arnold, upon a written agreement of guarantee, in the sum of \$2700.00, no part of which has ever been paid.

On June 21, 1937, the bankrupt became obligated to Louise M. Beckmeyer upon a written obligation

of guarantee in the sum of \$8,000.00, no part or portion of which has ever been paid.

That Dr. Arnold has never at any time known of the said conditional sales contracts of the respondents.

On or about June 24, 1937, the bankrupt became obligated to D. B. Robnett for professional services rendered in the sum of \$200.00; that D. B. Robnett never had any knowledge of the said conditional sales contracts of the respondents; that no part of said obligation has been paid.

That on May 23, 1938, the bankrupt was indebted to the Calkins Company, and that on March 6, 1939, the bankrupt was indebted to said company in the amount of \$148.27. That no part of said \$148.27 has ever been paid; and, that said company has never had any knowledge of the said conditional sales contracts of respondents. [75]

13. That said purported contracts of conditional sale and said purported conveyances are fraudulent and therefore void as against the trustee in bankruptcy herein.

14. That said Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, have threatened to proceed with the foreclosure of said purported contracts of conditional sale and remove the said mining machinery and equipment from the place of its present location at the Mt. King Mine in Calaveras County. That the removal of said mining machinery and equipment would prevent the said trustee from

making a satisfactory sale of the property and assets of the bankrupt. That the said mining machinery and equipment constitutes the main assets of the bankrupt and is a very valuable asset of the bankrupt. That great and irreparable injury and damage would be done to this estate if said Western-Knapp Engineering Co., and Western Machinery Company were permitted to remove the same from its present location or in any way interfere therewith.

15. That the allegations of paragraph XIV of said Trustee's petition are unproven except that it appears that within four months prior to March 15, 1939, the bankrupt paid to said Western-Knapp Engineering Co., and said Western Machinery Company \$10,000.00 for or on account of the purchase price of the mining machinery and equipment described as Parcels Two and Three herein.

16. That each of the allegations set forth and alleged in the said Answer of the respondents is either untrue or unproven except as herein found to be true.

ORDER OF REFEREE

Thereupon, on the 6th day of June, 1941, I entered an order ordering

1. That the said Bill of Sale and the said Contract of Conditional Sale dated May 23, 1938, and recorded May 28, 1938, in Book "U" of Agreements, page 462, et seq., in the office of the County

Recorder of Calaveras County, and the said Contract of Con- [76] ditional Sale dated August 16, 1938, and recorded August 20, 1938, in Book 4 of Official Records at page 293, et seq., in the office of the County Recorder of Calaveras County, and the Contract of Conditional Sale dated July 26, 1938, and recorded August 2, 1938, in Book "U" of Agreements at page 485, et seq., in the office of the County Recorder of Calaveras County, are, and each of them is, fraudulent and void as to the lien or interest claimed by said respondents and each of them in and to the said mining machinery and equipment of the bankrupt, and that neither of the said respondents has any right, title or interest therein, nor to any part thereof, except as a general unsecured creditor herein. That said mining machinery and equipment is more particularly described as follows:

Parcel One:

- 1—5x5 Marcy Ball Mill, #397, with V-belt drive and 60 HP motor, complete with sheave, slide rails and compensator.
- 3—Fagergren Flotation Machines, size 11-s, Type Std. Square, 720 RPM, Serial Nos. 21, 22 & 23.
- 2—Fagergren Flotation Machines, size 36x9, Type Std. Square, 600 RPM, one Serial No. 322, no number other machine.
- 1—Fagergren Flotation Machine, size 9-S Type Std. Square, 900 RPM, Serial No. S-51.
- 1—54" Duplex Dorr Classifier, with motor and V-belt drive, classifier Serial No. 1275D.
- 1—18x18 Pan American Jig, Type AC, No. 271.
- 1—Hoist Motor, Westinghouse Oil Well Motor, varying speed, 75 HP, 440 volts, 50/60 cycle, 3 phase, style 21C482, Frame 752, 90 Amps, 970-1160 RPM, full load, Serial #4501040.
- 1—Westinghouse Controller, Frame 50, Style S020 E171.

Parcel Two:

Counties in
which located
5-23-38

- 1—22x13x16 Ingersoll-Rand, Imperial Type, 2 stage, Air Compressor, complete with 200 HP, General Electric, 440 volt, 3 phase, 60 cycle motor, furnished with sheave and 13 V-belts, complete with sliding base and compensator. Mariposa
 - 1—100 H.P. Double Drum Ottumwa Iron Works Mine Hoist, complete with 100 H.P., 440 volt, 3 phase, 60 cycle, variable speed motor complete with resistance grids and drum controller. State of Utah
- [77]
- 1—Taper Bar Grizzly. Non-existent
 - 1—15x38 Wheeling Jaw Crusher with V-belt drive and 75 HP, 440 volt, 3 phase, 60 cycle motor, with sliding base and compensator. Sacramento

2. that said respondents are, and each of them is, hereby forever barred and restrained from proceeding with the foreclosure of, or asserting any right, title or interest in or to said mining machinery and equipment under, the said conditional sales contracts, or either of them, or from doing anything or taking any action, legal or otherwise, in connection with the removal of said mining machinery and equipment from the possession of the bankrupt, or the trustee, or from in any way interfering with the use, operation and sale of the said mining machinery and equipment by the trustee herein.

3. that the title in and to the said mining machinery and equipment is hereby quieted in the trustee in bankruptcy herein, and that said respondents are, and each of them is hereby, permanently enjoined and restrained from asserting any claim of any kind or nature in or to the said mining machinery and equipment or any part thereof;

4. that the said trustee is hereby authorized to institute [79] such a proceeding as may be proper in a court of competent jurisdiction with respect to the payments of money made by the bankrupt to said respondents within four months prior to March 15, 1939.

Notice of the entry of said Order was served on said respondents, Western-Knapp Engineering Co., and Western Machinery Company on the 3d day of July, 1941, as appeared by proof filed herein.

Thereafter, on the 22nd day of July, 1941, the said respondents, Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation, filed their petition for a review of the said Order by the Judge of the above entitled court.

Attached to this Certificate are the following documents:

1. Petition for Review;
2. The Petition of said O. T. Gilbank, as trustee of the estate of Jumbo Consolidated Mining Co., a corporation, bankrupt;
3. Stipulation amending said Petition of trustee dated February 19, 1940;
4. The Answer of said Respondents, Western-Knapp Engineering Co., a corporation, and Western Machinery Company, a corporation;
5. The said Order entered on the said Petition the 6th day of June, 1941;
7. Points and authorities considered by me in connection with the issues presented on review.

Dated: August 15th, 1941.

HUGH L. DICKSON,
Referee.

[Endorsed]: Filed Aug. 22, 1941. R. S. Zimmerman, Clerk. [80]

United States District Court
Southern District of California
Central Division

No. 33788-J.

In the Matter of JUMBO CONSOLIDATED MIN-
ING COMPANY, a corporation,
Bankrupt.

ORDER IN RE REVIEW OF REFEREE'S
ORDER, AND MEMORANDUM OF DECISION.

The petitioner on review concedes that unless the bankrupt-buyer was a non-resident of this state within the meaning of Section 2980 and related provisions of the Civil Code of California the conditional sales contracts relied on have been improperly and insufficiently recorded and consequently "offer no security as conditional sales contracts" to the sellers.

Our consideration of this review and of the briefs and arguments of counsel have convinced us that the findings of the referee are supported by the evidence and are in conformity to applicable law. Accordingly, the findings of fact and conclusions of law of the referee are adopted and constitute the findings of fact and conclusions of law of this court, and the order of the referee dated June 6, 1941 is confirmed, except as to that part of the said order authorizing the trustee to institute proceedings with respect to payments of money made by the bank-

rupt to petitioner on review within four months prior to March 15, 1939, and such part of the order is not confirmed and is vacated. Exceptions allowed.

We regard the question for decision as so clear under the record before us and under the laws of California which unquestionably control this matter that merely a brief statement in amplification of the foregoing order is sufficient.

The referee has summarized the evidence as to the residential locale of the corporation bankrupt at all times applicable to the inquiry before the court. It is unnecessary in this memorandum to restate the facts or to do more than state that [81] with the exception of the initial legal processes of organizing the corporate body in the State of Nevada, every substantial activity and function of the Jumbo Consolidated Mining Company has been carried on and performed within the State of California.

The question of residence is one of intent and the purpose of the bankrupt corporation relative to its commercial domicile while doing business in California has ~~ben~~ definitely shown to have been at all times the County of Los Angeles.

It is also significant and highly informative as to the corporation's expressed residential intent that in Paragraph Second of the articles of incorporation after providing that the principal office of the corporation in Nevada is in the City of Reno, it is stated "but that this corporation may maintain an office or offices in such other place or places, within or without the State of Nevada, as may from time

to time be designated by the board of directors or by the by-laws of this corporation, and that this corporation may conduct all corporate business of every kind and nature, including the holding of meetings of directors and stockholders, outside of the State of Nevada, the same as though conducted within the State of Nevada." This declaration even in the fundamental instrument creative of the corporate existence of the bankrupt company, followed by the indisputable location of the office of the corporation at Los Angeles County and other factors shown by the evidence and found by the referee, indicate that although formed in Nevada, the bankrupt corporation was for all practical and commercial purposes a California corporation which had its principal place of business in California in Los Angeles County.

In the language of the Supreme Court of California in its decision in *Wait v. Kern River Mining etc. Co.*, 157 Cal. 16, the bankrupt mining company now before this court "is a foreign corporation only in the sense that it is created in another state and continues to enjoy corporate life by permission of that [82] state. In every other sense it is solely a California corporation. So far as it in fact does or can do business at all, it does it solely by permission of this state, and within its borders. Under such circumstances its residence * * * anywhere else outside of California, is the merest fiction." See, also, late California Appellate Court decision in

Sharp v. Big Jim Mines, 39 C. A. (2d) 435, to the same effect.

It is true that neither of the two state court decisions pertain directly to the "recording statutes" of California, such as Sections 2980, 2959a or 2965 of the Civil Code of California. We think, however, that the unaided language of these code sections when considered, as they must be in this matter involving a "foreign corporation", with Section 405 of the same code, undoubtedly make secure the correctness of the referee's order under attack.

Dated December 29, 1941.

PAUL J. McCORMICK,

United States District Judge.

[Endorsed]: Filed Dec. 29, 1941. [83]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73(b)

Notice Is Hereby Given that Western-Knapp Engineering Co., a corporation, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from that portion of that certain Order and Judgment made and entered in the above-entitled proceeding by Hon. Paul J. McCormick, Judge of the above-entitled Court, on the 29th day of December, 1941, wherein and whereby said Court adopted as

the Findings of Fact and Conclusions of Law of said Court, the [84] Findings of Fact and Conclusions of Law of the Hon. Hugh L. Dickson, Referee in Bankruptcy of said Court, as set forth in said Referee's Certificate upon the Petition for Review filed herein by this Appellant from that certain Order of said Referee made and entered by him in the above-entitled Court on the 6th day of June, 1941, and the undersigned further hereby appeals to the aforesaid Circuit Court of Appeals, for the Ninth Circuit, from that portion of said Order of the above-entitled Court made herein on the said 29th day of December, 1941, wherein and whereby and to the extent that the said Order of said Referee, dated the said 6th day of June, 1941, was, by said Judge of the above-entitled Court, confirmed.

Dated at San Francisco, in the Northern District of California, this 26th day of January, 1942.

WESTERN-KNAPP
ENGINEERING CO., a
corporation, Appellant,
By ARTHUR P. SHAPRO,
Its Attorney.

[Endorsed]: Filed Jan. 27, 1942. Copy mailed to Attys. for Trustee.

E. L. S. [85]

[Title of District Court and Cause.]

BOND ON APPEAL

Whereas, Western-Knapp Engineering Co., a Corporation, the appellant in the above proceeding has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment made and entered on the 29th day of December, 1941, against said appellant in said proceeding in the Central Division of the United States District Court for the Southern District of California, in favor of O. T. Gilbank, as Trustee of the Estate of the bankrupt above-named.

Now, Therefore, in consideration of the premises and such appeal, American Employers' Insurance Company, incorporated under the laws of the Commonwealth of Massachusetts, and authorized to transact a surety business in the State of California, does hereby undertake and promise on the part of said appellant, that said appellant will pay all costs of said appeal which may be awarded against it if said judgment of said District Court is affirmed or if said appeal is dismissed, together with such costs as said Appellate Court may award if said judgment is modified, not exceeding the sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

It is further stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the above named District Court may, upon notice of not less than ten (10) days to the surety

above named, proceed summarily in said action or suit to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor.

Signed, sealed and dated this 26th day of January, 1942.

AMERICAN EMPLOYERS'
INSURANCE COMPANY,

(Seal) By JOHN A. VIOLICH,
Attorney in Fact.

The premium for this bond is \$10.00 per annum.

Bond approved Jan. 27, '42.

PAUL J. McCORMICK,
Judge. [86]

State of California,
County of——
City and County of
San Francisco—ss.

On This 26th day of January, A. D., 1942, before me, George A. Marks, a Notary Public in and for said County and State, personally appeared John A. Violich known to me to be the person whose name is subscribed to the within Instrument, as the Attorney-in-fact of American Employers' Insurance Company, and acknowledged to me that he subscribed the name of American Employers' Insurance Company thereto as principal and his own name as Attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) GEORGE A. MARKS,

Notary Public in and for said County and State.

My Commission Expires September 23, 1942.

[Endorsed]: Filed Jan. 27, 1942, P.M. R. S. Zimmerman, Clerk, By M. M. Karcher, Deputy Clerk. [87]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75(a).

To the above-entitled Court, and to R. S. Zimmerman, Esq., Clerk of said Court, and to O. T. Gilbank, as Trustee of the estate of the above-named Bankrupt, and to Messrs. Mitchell, Johnson & Ludwick, his attorneys:

Comes now Western-Knapp Engineering Co., a corporation, Appellant herein, and, in accordance with Rule 75(a) of the Federal Rules of Civil Procedure, designates the following as [88] the portions of the record, proceedings and evidence to be contained in the Record on Appeal, Notice of which said Appeal was heretofore filed herein on the 27th day of January, 1942, viz:

1. (Appellee's) Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien, together with the

Stipulation annexed thereto, and dated November 13, 1940, between Hubert F. Laugharn, former Trustee herein, and Appellant.

2. Order to Show Cause thereon issued on November 28, 1940, by Hon. Hugh L. Dickson, Referee in Bankruptcy.

3. (Appellant's) Answer to Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien.

4. Reporter's Transcript of hearing held on January 30, 1940, before Hon. Samuel W. McNabb, Referee in Bankruptcy.

5. Stipulation, dated February 19, 1940, amending the aforesaid Petition of Trustee.

6. "Memorandum Opinion", dated April 9, 1941, of Hon. Hugh L. Dickson, Referee in Bankruptcy, and Order of said Referee, dated April 11, 1941, extending time of Respondents to file Petition for Review of said Referee's Order.

7. Referee's Order dated June 6, 1941.

8. (Appellant's) Petition for Review of "Referee's Order Granting Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien".

9. Referee's Certificate upon said Petition for Review of said Referee's Order dated June 6, 1941.

10. Minute "Order in Re Review of Referee's Order, and Memorandum of Decision", entered by District Judge, and dated

December 29, 1941, confirming, in part, and reversing, in part, Referee's Order of June 6, 1941.

11. (Appellant's) Notice of Appeal, dated January 26, 1942.

12. (Appellant's) Bond on Appeal.

13. This Designation of Contents of Record on Appeal.

Dated: January 28, 1942.

Respectfully submitted,

ARTHUR P. SHAPRO,

Attorney for Appellant,

Western-Knapp Engineering
Co., a corporation. [89]

AFFIDAVIT OF SERVICE BY MAIL
(C. C. P. 1013A)

No. 33788-J

State of California,

City and County of San Francisco—ss.

Agnes Godde, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of said City and County, and not a party to the within action.

That affiant's (business) address is 420 Russ Bldg. San Francisco, Calif.

That affiant served a copy of the attached Designation of Contents of Record on Appeal Under

Rule (75(a) by placing said copy in an envelope addressed to Messrs. Mitchell, Johnson & Ludwick at their office address 333 Roosevelt Bldg., Los Angeles, Calif. which envelope was then sealed and postage fully prepaid thereon, and thereafter was on January 28, 1942, deposited in the United States mail at San Francisco, Calif.

That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

AGNES GODDE,

Subscribed and sworn to before me on this 28th day of January, 1942.

[Seal]

LOUIS WIENER,

Notary Public in and for said county and state.

[Endorsed]: Filed Jan. 29, 1942. [90]

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL UNDER
RULE 75(a)

To the above-entitled Court, and to R. S. Zimmerman, Esq., Clerk of said Court, and to O. T. Gilbank, as Trustee of the estate of the above-named Bankrupt, and to Messrs. Mitchell, Johnson & Ludwick, his attorneys:

Comes now Western-Knapp Engineering Co., a corporation, Appellant herein, and, in accordance

with Rule 75(a) of the Federal Rules of Civil Procedure, designates (in addition to the [91] items described in its Designation dated January 28, 1942, and heretofore filed herein on January 29, 1942), the following as the portions of the record, proceedings and evidence to be contained in the Record on Appeal, Notice of which said Appeal was heretofore filed herein on the 27th day of January, 1942, viz.:

14. Original Debtor's Petition under Chapter XI.

15. Order of Reference of said Petition under Chapter XI to Referee.

16. Order of Adjudication made by Referee on September 11, 1940.

17. This Supplemental Designation of Contents of Record on Appeal.

Dated: February 11, 1942.

Respectfully submitted,

ARTHUR P. SHAPRO,

Attorney for Appellant, Western-Knapp Engineering Co., a corporation. [92]

AFFIDAVIT OF SERVICE BY MAIL
(C. C. P. 1013A)

No. 3378-J

State of California,
City and County of San Francisco—ss.

Agnes Godde, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of said City and County, and not a party to the within action.

That affiant's (business) address is 420 Russ Bldg., San Francisco, Calif.

That affiant served a copy of the attached Supplemental Designation of Contents of Record on Appeal Under Rule 75(a) by placing said copy in an envelope addressed to Messrs. Mitchell, Johnson & Ludwick at their office address 333 Roosevelt Bldg., Los Angeles, Calif. which envelope was then sealed and postage fully prepaid thereon, and thereafter was on February 11, 1942, deposited in the United States mail at San Francisco, Calif. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

AGNES GODDE

Subscribed and sworn to before me on this 11th day of February, 1942.

[Seal]

LOUIS WIENER,
Notary Public in and for said county and state.

[Endorsed]: Filed Feb. 13, 1942. [93]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF DOCUMENTS AND FOR INCLUSION THEREOF AS PART OF THE RECORD ON APPEAL

It appearing to the Court from the records, papers and files herein that, under date of January 27, 1942, an appeal has been perfected herein by Western-Knapp Engineering Co., a corporation, from the "Order in Re Review of Referee's Order, and Memorandum of Decision" herein made by this Court on December 29, 1941, and that said Appellant has, by designation (under Rule 75(a)), requested the Clerk of this Court to include upon the Record on said Appeal certified copies of the following documents, the originals of which are on file with Hon. Hugh L. Dickson, Referee in Bankruptcy, and not with said Clerk of this Court, and good cause appearing therefor,

Now, upon motion of Arthur P. Shapro, Esq., Attorney for said Appellant,

It Is Hereby Ordered that said Hon. Hugh L. Dickson, Referee in Bankruptcy, forthwith transmit to the Clerk of the above-entitled Court the originals of each and all of the following documents on file with him in the above-entitled matter, viz.:

(a) Order to Show Cause, dated November 28, 1940, issued by said Referee upon the Petition of Hubert F. Laugharn, (former) Trustee herein, and to which Appellant and Western Machinery Company, a corporation, are Re-

spondents, and which [94] was returnable on the 16th day of December, 1940.

(c) Order of said Referee, dated April 11, 1941, extending time of Respondents to file Petition for Review of said Referee's Order.

It Is Further Ordered that certified copies of items above numbered (a) and (c), when so received by said Clerk from said Referee, shall be included in the Record on Appeal to be hereafter prepared by said Clerk and transmitted to the Circuit Court of Appeals, for the Ninth Circuit, pursuant to the provisions of Rule 75(b) of the Federal Rules of Civil Procedure.

Dated at Los Angeles, in said District, this 13th day of February, 1942.

PAUL J. McCORMICK

District Judge

[Endorsed]: Filed Feb. 13, 1942. [95]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby *hereby* certify that the foregoing pages numbered from 1 to 95 inclusive contain full, true and correct copies of: Debtor's Petition; Resolution of Board of Directors; Approval of Petition and Order of Reference; Order of

Adjudication; Stipulation dated Nov. 13, 1940; Petition of Trustee for Recovery of Assets; Order to Show Cause; Answer to Petition of Trustee; Stipulation Amending Trustee's Petition dated Feb. 19, 1940; Order of Referee dated June 6, 1941; Order Extending Time to File Petition for Review; Petition for Review; Referee's Certificate on Review; Order and Decision of District Judge; Notice of Appeal; Bond on Appeal; Designation of Record on Appeal; Supplemental Designation of Record on Appeal, and Order for Inclusion of Certain Documents in the Record, which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$30.95, which amount has been paid to me by Appellant.

Witness my hand and the seal of the said District Court this 28th day of February, A. D. 1942.

[Seal]

R. S. ZIMMERMAN,

Clerk,

By: EDMUND L. SMITH,

Deputy.

[Endorsed]: No. 10073. United States Circuit Court of Appeals for the Ninth Circuit. Western-Knapp Engineering Co., a corporation, Appellant, vs. O. T. Gilbank, Trustee of the Estate of Jumbo Consolidated Mining Company, a corporation,

Bankrupt, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 2, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Case No. 10073

WESTERN-KNAPP ENGINEERING CO.,
Appellant,

vs.

O. T. GILBANK, Trustee, etc.,
Appellee.

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON BY APPELLANT ON AP-
PEAL, AND DESIGNATION OF PARTS
OF THE RECORD NECESSARY FOR THE
CONSIDERATION THEREOF UNDER
RULE 19(6).

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON BY APPELLANT UNDER
RULE 19(6)

Comes now Western-Knapp Engineering Co., a corporation, Appellant herein, and, in accordance

with Rule 19(6) of the above-entitled Court, specifies the following as a concise statement of the points on which said Appellant intends to rely on the appeal heretofore perfected (and filed in the above-entitled Court) from the Order made and entered by Hon. Paul J. McCormick, Judge of the United States District Court, for the Southern District of California, on the 29th day of December, 1941, and more particularly specified and described in the Notice of such Appeal (Certified Record p. 84), dated January 26, 1942, and filed with the Clerk of said District Court on the 27th day of January, 1942, viz.:

That that portion of that certain ORDER OF said DISTRICT JUDGE, ENTERED in said District Court ON THE 29TH DAY OF DECEMBER, 1941, (C. R. p. 81), wherein and whereby said District Court adopted as the Findings of Fact and Conclusions of Law of said Court, the Findings of Fact and Conclusions of Law (C. R. pp. 69-75) of the Hon. Hugh L. Dickson, Referee in Bankruptcy of said Court (as set forth in said Referee's Certificate upon the Petition for Review filed with said District Court by Appellant from that certain Order of said Referee made and entered by him on the 6th day of June, 1941), and WHEREIN AND WHEREBY, and to the extent that, by said Order, SAID DISTRICT JUDGE CONFIRMED THE said ORDER OF said REFEREE DATED the said 6TH DAY OF JUNE, 1941 (C. R. p. 76), all IN SO FAR AS SAID

REFEREE'S ORDER, and the subsequent Order of the District Judge confirming same (hereinafter referred to as the "Order herein appealed from") refers and APPLIES TO THE PERSONAL PROPERTY DESCRIBED in and AS "PARCEL TWO" OF SAID REFEREE'S ORDER, was and is erroneous and contrary to law, in that

(a) Said Order herein appealed from is not supported by, and is contrary to the evidence adduced by Appellant and by Appellee upon the hearing before said Referee of said Appellee's "Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien" (C. R. page 16);

(b) That the evidence adduced by Appellee in support of his said Petition was and is insufficient to warrant the relief therein prayed for and/or thereafter granted to Appellee by the aforesaid Referee's Order and by the Order herein appealed from (with respect to the said personal property described as "Exhibit 2");

(c) That the aforesaid evidence so adduced by Appellant and Appellee upon the hearing by said Referee of said Appellee's Petition shows affirmatively, and without contradiction, that the Bankrupt, Jumbo Consolidated Mining Company, a corporation, was at all of the times therein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and at all times since on or about the 1st day of September, 1937, was qualified to and did carry

on business, as such foreign corporation, in the State of California, and that by reason of the premises and all of the evidence so adduced upon the issues so raised by Appellant's answer to Appellee's "Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien", SAID BANKRUPT WAS, AT THE TIME OF THE EXECUTION OF THE CONTRACT OF CONDITIONAL SALE BETWEEN SAID BANKRUPT AND APPELLANT, DATED MAY 23, 1938, and of the Supplemental Agreement on Conditional Sale, likewise between said parties, and of even date therewith, A FOREIGN CORPORATION AND A NON-RESIDENT OF THE STATE OF CALIFORNIA, WITHIN THE MEANING OF SECTION 2980 OF THE CIVIL CODE OF CALIFORNIA;

(d) That the evidence so adduced by the respective parties upon the aforesaid issues, likewise by reason of the premises, shows affirmatively that the aforesaid and above described Contract of Conditional Sale and Supplemental Agreement thereon, between said Bankrupt and Appellant, were properly and timely and duly recorded in compliance and in accordance with the provisions of the aforesaid Section 2980 of the Civil Code of California; and that, in all respects, said Contract of Conditional Sale and all of the rights and privileges therein granted to Appellant were and are valid, enforceable and subsisting, both as against said

Bankrupt and as against Appellee herein (the Trustee of said Bankrupt's estate);

(e) That at none of the times hereinabove or in said Appellee's "Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien" mentioned, was said Bankrupt (the conditional vendee of the personal property described as "Exhibit 2" thereof) a "resident" of the County of Los Angeles, State of California, as that term is used in said Section 2980 of said Civil Code, so as to require the recordation of said Contract of Conditional Sale between said Bankrupt and Appellant in the said County of Los Angeles.

Dated at San Francisco, California, this 3rd day of March, 1942.

Respectfully submitted,

ARTHUR S. SHAPRO

Attorney for Appellant

DESIGNATION OF PARTS OF RECORD
NECESSARY FOR THE CONSIDERATION
OF APPEAL UNDER RULE 19(6)

Comes now Western-Knapp Engineering Co., a corporation, Appellant herein, and hereby designates, as the parts of the Record which it thinks necessary for the consideration of such Appeal, the entire Record as contained in the transcript of such Record on Appeal heretofore transmitted to the Clerk of the above-entitled Court by the Clerk of the United States District Court, for the Southern District of California.

Dated March 3, 1942.

ARTHUR S. SHAPRO

Attorney for Appellant

[Endorsed]: Filed March 2, 1942. Paul P. O'Brien, Clerk.

No. 10,073

2

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

WESTERN-KNAPP ENGINEERING Co.
(a corporation),

Appellant,

vs.

O. T. GILBANK, Trustee of the Estate
of Jumbo Consolidated Mining Com-
pany (a corporation), Bankrupt,

Appellee.

OPENING BRIEF FOR APPELLANT.

ARTHUR P. SHAPRO,

Russ Building, San Francisco,

Attorney for Appellant.

HAROLD A. BLOCK,

Monadnock Building, San Francisco,

Of Counsel.

FILED

APR 20 1942

PAUL P. O'BRIEN,
CLERK

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No. 10,073

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN-KNAPP ENGINEERING CO.

(a corporation),

Appellant,

vs.

O. T. GILBANK, Trustee of the Estate
of Jumbo Consolidated Mining Com-
pany (a corporation), Bankrupt,

Appellee.

OPENING BRIEF FOR APPELLANT.

JURISDICTION.

This is an appeal from a portion of that certain Order of the District Court of the United States for the Southern District of California, Central Division, entered in said District Court on the 29th day of December, 1941 (Transcript of Record, pp. 102-105), wherein and whereby said District Court adopted as the Findings of Fact and Conclusions of Law of said Court, the Findings of Fact and Conclusions of Law (T. R. pp. 85-95) of the Referee in Bankruptcy of said Court (as set forth in said Referee's Certificate upon the Petition for Review, filed with said District

Court by Appellant, of that certain Order of said Referee made and entered by him on the 6th day of June, 1941 (T. R. pp. 95-101), wherein and whereby, said District Judge confirmed the said Order of said Referee, in so far as said Referee's Order, and the subsequent Order of the District Judge confirming the same refers and applies to the personal property described in and as "Parcel Two" (T. R. pp. 97-98) of said Referee's Order.

On March 15, 1939, the Jumbo Consolidated Mining Company, a Nevada Corporation, filed with the District Court of the United States for the Southern District of California, Central Division, its Petition under Chapter 11 of the Bankruptcy Act. (Title 11, U. S. C. A., Sec. 202) (T. R. pp. 1-11.) Subsequently the Referee in Bankruptcy, to whom the aforesaid proceedings had been referred, made and entered an Order of Adjudication in Bankruptcy. (T. R. pp. 14-15.)

On November 28, 1940, the appellee (trustee in bankruptcy herein) filed with the Referee in Bankruptcy his "Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien" (T. R. pp. 19-31), naming the appellant herein as one of the respondents to an Order to Show Cause thereon. (T. R. pp. 31-34.) Within the time allowed by law appellant and the other respondent to said Order to Show Cause filed their answer to said Petition (T. R. pp. 35-44) and joined issue on certain points which were thereupon raised by the pleadings hereinabove referred to. Certain hearings

on said Order to Show Cause were had, as a result of which, the Referee made and entered that certain "Order" of June 6, 1941, heretofore referred to.

On July 22, 1941, and within the time allowed by law, appellant filed its "Petition for Review" of said Order (T. R. pp. 68-74), and on December 29, 1941, the District Court made and entered the Order herein appealed from whereby said District Court confirmed a portion of the said Referee's Order, and vacated another portion of said Order. (T. R. pp. 102-105.)

This appeal is prosecuted from that portion of the aforesaid order of the District Court which confirmed and failed to vacate the Referee's Order of June 6, 1941.

The appellate jurisdiction of this Court is invoked under Section 24a of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 47(a)) and General Order in Bankruptcy No. 36.

STATEMENT OF THE CASE.

On May 23, 1938, appellant (as conditional vendor), and bankrupt (as conditional vendee), entered into a Contract of Conditional Sale covering certain mining machinery (described in T. R. pp. 97-99 as "Parcel One", "Parcel Two", and "Parcel Three".) (Finding No. 8; T. R. p. 90.) In this appeal we are solely concerned with the personal property described as "Parcel Two", the correctness of the appellee's position with reference to "Parcels One and Three" hav-

ing been conceded. (T. R. p. 75.) The aforesaid Contract of Conditional Sale was recorded on May 28, 1938, in Book "U" of Agreements, at pages 462 et seq., in the office of the County Recorder of Calaveras County, California. (Finding No. 9; T. R. pp. 90-91.) Said contract was never recorded in any other county. (T. R. p. 91.) The personal property described in "Parcel Two" of said contract was to be situated at the Mt. King Mine, which is located in Calaveras County, California. (Finding No. 6; T. R. p. 89.)

At all of the times herein mentioned the bankrupt was a Nevada Corporation, and was qualified to do business in California. (Finding No. 2; T. R. pp. 85-88.) In the certificate filed with the Secretary of State of the State of California (as required of foreign corporations doing business in this State under Section 405 of the California Civil Code), the bankrupt had designated the County of Los Angeles as the "principal office of the corporation *within* the State of California". (Italics ours; T. R. p. 87.)

THE QUESTION INVOLVED.

The only *question* involved in this appeal is whether the bankrupt-buyer (a foreign corporation) was a "non-resident" of the State of California within the meaning of Section 2980 and related provisions of the California Civil Code so as to require the recording of the Contract of Conditional Sale in Los Angeles County. (Referee's Certificate, T. R. p. 75;

Order and Memo of District Judge, T. R. pp. 102-105.)

STATUTES INVOLVED.

The pertinent portions of the statutes involved in this case are as follows:

Section 2980, *California Civil Code*:

“Every conditional sales contract * * * of equipment and machinery used or to be used for mining purposes, must be * * * recorded within twenty (20) days after its execution in the office of the recorder of the county where the *buyer* * * * resides at the time he executes such contract * * * *or in case the buyer* * * * *is a non-resident of this State*, in the office of the recorder of the county or counties *where the property involved is located at the time the contract* * * * *is executed by the buyer* * * * and a contract of conditional sale of equipment and machinery used or to be used for mining purposes shall also be recorded in every case in the county where the property is situated, otherwise, it shall be void as to the lien, or interest of the seller * * * against * * * those having no actual knowledge of the contract * * * who became creditors of the buyer * * * while said property is in the possession of any of the last mentioned parties.

Sections 2959a and 2965 of the Civil Code are hereby made applicable to the instruments required to be recorded by this section in the same manner as to mortgages of personal property.”
(Italics ours.)

Section 2959a, *California Civil Code*:

“Where the mortgagor of personal property or crops is a corporation or a partnership the county of residence thereof for the purpose of recording such mortgage shall be deemed to be the county wherein such corporation or partnership has its principal place of business within this state.”

Section 405, *California Civil Code*:

“In this chapter the term ‘foreign corporation’ means a corporation not incorporated under the laws of this state * * *”

“No foreign corporation shall transact intrastate business in this State until it has filed with the Secretary of State a copy of its articles duly certified by the Secretary of State or other official of the government under the laws of which it was created, nor until it has also filed with the Secretary of State a statement setting forth:

(1) The location and address of its principal office;

(2) The location and address of its principal office within this state; * * *”

**SPECIFICATION OF ERRORS UPON WHICH
APPELLANT RELIES.**

The appellant specifies as error (T. R. pp. 118-122):

That that portion of that certain ORDER OF said DISTRICT JUDGE, ENTERED in said District Court ON THE 29TH DAY OF DECEMBER,

1941 (T. R. pp. 102-105), wherein and whereby said District Court adopted as the Findings of Fact and Conclusions of Law of said Court, the Findings of Fact and Conclusions of Law (T. R. pp. 85-95) of the Hon. Hugh L. Dickson, Referee in Bankruptcy of said Court (as set forth in said Referee's Certificate upon the Petition for Review filed with said District Court by Appellant from that certain Order of said Referee made and entered by him on the 6th day of June, 1941), and WHEREIN AND WHEREBY, and to the extent that, by said Order, SAID DISTRICT JUDGE CONFIRMED THE said ORDER OF said REFEREE DATED the said 6TH DAY OF JUNE, 1941 (T. R. pp. 95-101), all IN SO FAR AS SAID REFEREE'S ORDER, and the subsequent Order of the District Judge confirming same (hereinafter referred to as the "Order herein appealed from") refers and APPLIES TO THE PERSONAL PROPERTY DESCRIBED in and as "PARCEL TWO" OF SAID REFEREE'S ORDER, was and is erroneous and contrary to law, in that

(a) Said Order herein appealed from is not supported by, and is contrary to the evidence adduced by Appellant and by Appellee upon the hearing before said Referee of said Appellee's 'Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien' (T. R. pp. 19-31);

(b) That the evidence adduced by Appellee in support of his said Petition was and is insufficient to

warrant the relief therein prayed for and/or thereafter granted to Appellee by the aforesaid Referee's Order and by the Order herein appealed from (with respect to the said Personal property described as 'Exhibit 2');

(c) That the aforesaid evidence so adduced by Appellant and Appellee upon the hearing by said Referee of said Appellee's Petition shows affirmatively, and without contradiction, that the Bankrupt, Jumbo Consolidated Mining Company, a corporation, was at all of the times therein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and at all times since on or about the 1st day of September, 1937, was qualified to and did carry on business, as such foreign corporation, in the State of California, and that by reason of the premises and all of the evidence so adduced upon the issues so raised by Appellant's answer to Appellee's 'Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien'', SAID BANKRUPT WAS, AT THE TIME OF THE EXECUTION OF THE CONTRACT OF CONDITIONAL SALE BETWEEN SAID BANKRUPT AND APPELLANT, DATED MAY 23, 1938, and of the Supplemental Agreement on Conditional Sale, likewise between said parties, and of even date therewith, a FOREIGN CORPORATION AND A NONRESIDENT OF THE STATE OF CALIFORNIA WITHIN THE MEANING OF SECTION 2980 OF THE CIVIL CODE OF CALIFORNIA;

(d) That the evidence so adduced by the respective parties upon the aforesaid issues, likewise by reason of the premises, shows affirmatively that the aforesaid and above described Contract of Conditional Sale and Supplemental Agreement thereon, between said Bankrupt and Appellant, were properly and timely and duly recorded in compliance and in accordance with the provisions of the aforesaid Section 2980 of the Civil Code of California; and that, in all respects, said Contract of Conditional Sale and all of the rights and privileges therein granted to Appellant were and are valid, enforceable and subsisting, both as against said Bankrupt, and as against Appellee herein (the Trustee of said Bankrupt's estate);

(e) That at none of the times hereinabove or in said Appellee's 'Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien' mentioned, was said Bankrupt (the conditional vendee of the personal property described as 'Exhibit 2' thereof) a 'resident' of the County of Los Angeles, State of California, as that term is used in said Section 2980 of said Civil Code, so as to require the recordation of said Contract of Conditional Sale between said Bankrupt and Appellant in the said County of Los Angeles.

ARGUMENT.

I.

SECTION 2980 OF THE CALIFORNIA CIVIL CODE MAKES DIFFERENT RECORDATION REQUIREMENTS FOR "RESIDENTS" AND FOR "NON-RESIDENTS".

Paraphrasing the code section involved, we see:

A. If the conditional buyer is a *resident*, the contract must be recorded in the "office of the recorder of the county where the buyer * * * resides" at the time he executes the contract. Such contract must *also* be recorded in the county where the property is "situated", when the contract, as here, involves "equipment and machinery used or to be used for mining purposes".

B. If the conditional buyer is a *non-resident*, the contract must be recorded "in the county or counties where the property involved is *located* at the time the contract is * * * executed by the buyer".

It is of no importance here for us to determine why the legislature made different requirements for residents and non-residents. The fact is that the requirements are different. In the instant case, the conditional sales contract involved was recorded where the property involved was located at the time the contract was executed; it was not recorded where the buyer had its purported "residence" within the State of California, to-wit: in Los Angeles County.

If the bankrupt-buyer was a "resident" of this State within the meaning of the requirements set forth in Section 2980 of the Civil Code for "residents", then the contract was improperly recorded,

and this appeal must fail. On the other hand, if the bankrupt-buyer was a "non-resident" of this state within the requirements of said code section, the contract was properly recorded in Calaveras County, and the Order herein appealed from should be reversed.

II.

WITHIN THE MEANING OF SECTION 2980 OF THE CALIFORNIA CIVIL CODE THE BANKRUPT-BUYER WAS A "NON-RESIDENT".

A. THERE ARE NO CALIFORNIA CASES INTERPRETING THIS POINT.

So far as we have been able to determine, this is a case of first impression both in the Federal Courts and in the Courts of the State of California. There are no cases deciding whether a *foreign* corporation is a "resident" or "non-resident" within the meaning of this code section.

Nor are there any cases involving a similar determination of that question under the related Section 2959a of the Civil Code. *Matter of A & B Oil Co.*, 95 F. (2d) 946, is as close a *California* case as we have been able to find, but that case holds that so far as a *domestic corporation* is concerned, it is a resident of the County of its designated principal place of business within the meaning of Section 2959a of the California Civil Code. Under the doctrine of this case, we must concede that if the bankrupt-buyer had been a *California* corporation rather than a *Nevada* corporation, the recordation herein could not

legally be supported. The point is, however, that we here have the problem of where the proper recordation (under Section 2980, Civil Code) must be made when the buyer is a *foreign* corporation.

B. SIMILAR STATUTES IN OTHER STATES HAVE BEEN INTERPRETED BY THE FEDERAL COURTS TO HOLD THAT A FOREIGN CORPORATION IS ALWAYS A "NON-RESIDENT" WITHIN THE MEANING OF SUCH RECORDING STATUTES.

In New Hampshire the conditional sales recording statute (Pub. Laws, N. H. 1926, c. 216, Secs. 27, 28, 30) requires a memorandum of the contract "to be recorded in the town clerk's office of the town:

I. Where the purchaser resides, if within this state; or

II. Where the vendor resides, if within this state; or

III. *Where the property is situated if neither purchaser or vendor resides in the State.*" (Italics ours.)

In a case which involved a corporation organized under the laws of the State of Maine (as seller) and a corporation organized under the laws of New York, but licensed to do business in New Hampshire, and having filed its requisite certificate designating its "principal place of business in New Hampshire", as in Berlin, New Hampshire (as buyer), the question arose as to whether proper recordation of the contract would be under the first, second, or third alternative provided in the above-quoted statute. The court held that recordation must be made under the *third*

alternative, as “neither the purchaser or vendor resides in the State”. *Babcock & Wilcox Co. v. Spaulding* (1936, C. C. A. 1st), 86 F. (2d) 256.

The facts of the case were: Cameron Company, a New York Corporation, as conditional vendor, sold certain personal property under a conditional sales contract to Brown Company, a Maine Corporation. Brown Company was licensed to do business in New Hampshire, and had designated its principal place of business in New Hampshire, as in the town of Berlin, New Hampshire. At the time of the execution of the conditional sales contract, the property described therein was located in the town of Gorham, New Hampshire. Cameron Company had only recorded the contract in Berlin, the county where the Brown Company had designated in its certificate as “its principal place of business within this State” (i.e., New Hampshire).

Subsequently, Brown Company was adjudicated bankrupt. When the Cameron Company attempted to repossess the property covered by the contract, the trustee contended that both vendor and vendee were “non-residents” and the contract should have been recorded in accordance with the third requirement of the statute, and that the lien of the vendor must fail.

The Referee in Bankruptcy and the District Court each upheld the trustee’s position. (See *In re Brown Co.* (1936), 14 F. Supp. 251.) The Circuit Court of Appeals *affirmed* this decision. In so doing, it said (p. 257 et seq.):

“Under these provisions of law the validity of the Cameron Company’s lien depends upon whether the Brown Company *resided* in Berlin. If it did, the memorandum could be properly recorded there. If both the Brown Company and the Cameron Company resided out of the state, the memorandum should have been recorded in Gorham where the property was situated. It was not recorded in Gorham, but in Berlin, and was properly recorded there only in case the Brown Company had a residence in Berlin. Did the Brown Company, a corporation, organized under the laws of Maine, have a residence in Berlin, New Hampshire? Undoubtedly an individual domiciled in Maine can acquire a temporary residence in New Hampshire sufficient to make a lien valid if the memorandum of conditional sale is there recorded. But as to a corporation the situation is different.

A corporation ‘cannot migrate’. *Baltimore & O. Railroad Company v. Harris*, 12 Wall. 65, 81, 20 L. Ed. 354. It is generally held in this country, and particularly *in the federal courts, that a corporation’s residence is in the state of its incorporation ‘and can be nowhere else’.*” (Italics ours.)

The Court cited with approval the following language contained in *Germania Fire Insurance Company v. Francis*, 11 Wall. 210, 216, 20 L. Ed. 77, to-wit (p. 258 of *Spaulding* case, *supra*):

“* * * a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it can-

not change its domicile at will, and, although it may be permitted to transact business where its charter does not operate it *cannot* on that account *acquire a residence there.*" (Italics ours.)

And in referring to the case of *In re Schollinberger*, 96 U. S. 369, 377, 24 L. Ed. 853, the Court quoted this language (p. 258 of *Spaulding* case, *supra*):

"A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter. See, also, *Bank of Augusta v. Earle*, 13 Pet. 519, 588, 10 L. Ed. 274; *Baltimore & Ohio Railroad v. Koontz*, 104 U. S. 5, 11, 26 L. Ed. 643; *Fairbanks Steam Shovel Co. v. Wells*, 240 U. S. 642, 647, 36 S. C. 466, 60 L. Ed. 841; and the long list of cases in 14a, C. J. 1224, note 94."

The District Court's opinion in this matter contains additional legal reasoning and authority, the pertinent parts of which are quoted below (*In re Brown*, *supra*, at 253):

"The purchaser here, Brown Company, was a Maine corporation located and having its principal place of business in Maine. It was a non-resident of New Hampshire, and had filed a certificate to that effect in New Hampshire. *The fact that it did a large part of its manufacturing business in New Hampshire is not controlling.*"

"The residence of a corporation must be in the State which incorporated it, so that in any other State it is a non-resident, and the statute, requiring mortgages by non-residents to be recorded in the town where the property is, ap-

plies and must be enforced.” *Jones on Chattel Mortgages and Conditional Sales*, Sec. 253.

“* * * I consider that the New Hampshire statute, in using the words ‘where the purchaser * * * or vendor resides’, in the case of a corporation, refers to a New Hampshire corporation, and that a *corporation foreign to New Hampshire must be regarded as having* a foreign residence, within the state that is referred to by the statute.” (Italics ours.)

The case of *Whitney v. Browne* (1902), 180 Mass. 597, 62 N. E. 979 (which is “very much in point” according to the District Court’s opinion in *In re Brown Co.*, supra), holds that where a statute requires a “non-resident’s mortgage” to be recorded where the property is located, the failure of a foreign corporation to so record is fatal, even though the foreign corporation has filed the requisite certificate designating its principal place of business in Massachusetts.

And in *Ward v. Southern Sand & Gravel Co.* (1929) (U.S.D.C.N.C.), 33 F. (2d) 773, the bankrupt-buyer was a Delaware corporation, which had designated as its principal place of business in North Carolina “Sanford, Lee County, North Carolina”. The conditional vendor had recorded in Lee County. At the time the contract was executed, the property was located in Harnett County.

“Section 3312 of the Consolidated Statutes, N. C., requires all conditional sales of personal property to be registered in the same manner and with the same legal effect as is provided for

chattel mortgages in the county *where the purchaser resides, or in case the purchaser shall reside out of the state, then in the county where the personal estate of some part thereof is situated.*" (Italics ours.)

The Court held that the contract had been recorded in the wrong county, since the conditional vendor was *not* a "resident".

The Court said (p. 774):

"The compliance by a foreign corporation with the requirements of C. S. Sec. 1181* *does not make the foreign corporation a resident of the State, or of the county where its principal office is located* for the purposes of C. S. Secs. 3311 and 3312. This statute is nothing more than a license to do business in North Carolina. * * * The chief purposes of this provision were to enable a litigant to obtain service of process on the foreign corporation in this state, and incidentally to collect a tax on the foreign corporation for the privilege of transacting business in this state.

A corporation can have no legal existence outside of the boundaries of the sovereign by which it is created. It has its domicile in the state which created it, and it cannot acquire a domicile in another state, although it may have an office and do business there (Citing cases.) and for the same reason *a corporation cannot be a resident of another state than that in which it is created. Such is the uniform construction of states in which the term 'resident' or 'non-resi-*

*This section is practically identical with Section 405 of the California Civil Code.

*dent' is used, where the question is presented whether a foreign corporation is included in the term. See cases cited in Clark on Corporations (2d. Ed.), p. 67. * * **

“The facts in our case are practically the same as those in the case of *Whitney v. Browne*, 180 Mass. 507, 62 N. E. 979. * * *” (*Italics ours.*)

Section 2980 of the Civil Code requires “resident” buyers to record in the *county of their residence*, and “non-resident” buyers to record only in the *county in which the property involved is located at the time of the execution of the contract.*

With respect to making different requirements for the recordation of such contracts by “residents” and “non-residents”, the California statute and the New Hampshire and North Carolina statutes are, in all respects, analogous. Consequently, if in New Hampshire, or North Carolina, a foreign corporation which has its “principal place of business” in that state in a particular county is, nevertheless, a “non-resident” of that State for the purposes of meeting the recording requirements of the New Hampshire or of the North Carolina statute, it follows that a foreign corporation having its designated principal place of business in California in a particular county within this state is also a “non-resident” within the meaning of the California Civil Code Section 2980.

CONCLUSION.

The California Legislature has set forth in Section 2980 of the Civil Code one method of recording certain types of conditional sales contracts where the buyer is a "resident", and another means of recordation where the buyer is a "non-resident". We have seen that the Federal Courts, in interpreting the recording statutes of other states requiring one method of recording a contract when the buyer is a "resident", and another method when the buyer is a "non-resident" have always held that a foreign corporation is a "non-resident" within the meaning of such statutes. Unquestionably, then, the Federal Courts should interpret the provisions of Section 2980 of the Civil Code of the State of California in a similar manner and hold that a foreign corporation must necessarily always be a "non-resident" within the meaning of this statute.

In the case at bar the Referee and District Judge by their respective orders held invalid, as against appellee-trustee, appellant's contract of conditional sale, solely by reason of their conclusion that the contract in question was improperly recorded because they found that the bankrupt buyer, a Nevada corporation, was, nevertheless, a "resident" of the State of California within the meaning of Section 2980, Civil Code. It is obvious, therefore, that the District Court erred, because, as we have demonstrated clearly above, the Nevada corporation (bankrupt-buyer) could not possibly be anything but a "non-resident" within the meaning of Section 2980 of the Civil Code.

It is therefore respectfully submitted that the Order of the District Court made on December 29, 1941, should be, by this Court, reversed, with instruction to said District Court to enter an Order denying the Trustee's petition to recover assets and to grant to the appellant the relief prayed for in the answer thereto.

Dated, San Francisco,
April 20, 1942.

Respectfully submitted,
ARTHUR P. SHAPRO,
Attorney for Appellant.

HAROLD A. BLOCK,
Of Counsel.

No. 10,073.

IN THE

3

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN-KNAPP ENGINEERING CO. (a corporation),

Appellant,

vs.

O. T. GILBANK, Trustee of Estate of Jumbo Consolidated
Mining Co. (a corporation), Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

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FILED

MAY 21 1947

PAUL P. O'BRIEN,

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FOR THE NINTH CIRCUIT

WESTERN-KNAPP ENGINEERING CO. (a corporation),

Appellant,

vs.

O. T. GILBANK, Trustee of Estate of Jumbo Consolidated
Mining Co. (a corporation), Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

Jurisdictional Statement.

PLEADINGS AND FACTS:

On March 15, 1939, Jumbo Consolidated Mining Co., a Nevada corporation, filed with the District Court of the United States for the Southern District of California, Central Division, its petition under Chapter XI of the Bankruptcy Act. (Title 11, U. S. C. A., Sec. 202.) [Tr. pp. 1-12.]

On March 16, 1939, the said District Court made and entered its order approving said petition and referring the said matter generally to Hon. Samuel W. McNabb, one of the referees in bankruptcy of said court. [Tr. p. 13.]

On September 11, 1940, the said referee in bankruptcy to whom the aforesaid matter had been referred made an order adjudicating said Jumbo Consolidated Mining Co. a bankrupt, which order was duly filed September 17, 1940. [Tr. pp. 14-15.]

On November 28, 1940, the appellee filed with the referee in bankruptcy his "Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien." [Tr. pp. 19-31.] Paragraph I of said petition was amended by stipulation filed February 19, 1941, alleging the appellee to be the party in interest in the place and stead of Hubert F. Laugharn. [Tr. pp. 45-46.] Upon said petition an order to show cause was issued naming the appellant herein as one of the respondents therein. [Tr. pp. 31-34.]

On December 13, 1940, and within the time allowed by law, appellant and the other respondent to said order to show cause filed their answer to the said petition [Tr. pp. 35-44] and joined issue on certain points which were thereupon raised by the pleadings hereinabove referred to.

Certain hearings were had on said order to show cause, as a result of which, on June 6, 1941, the referee made and filed his findings of fact, conclusions of law and order with respect to the said issues. [Tr. pp. 47-66.]

On June 22, 1941, and within the time allowed by law, appellant filed its "Petition for Review of Referee's Order Granting Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid

Lien" [Tr. pp. 68-74], which petition, together with the "Certificate by Referee to Judge" [Tr. pp. 74-101], was filed with the clerk of the said District Court August 22, 1941.

On December 29, 1941, the Hon. Paul J. McCormick, Judge of the said District Court, made and filed his "Order *in re* Review of Referee's Order, and Memo of Decision." [Tr. pp. 102-105.]

STATUTORY PROVISIONS:

The District Court had jurisdiction to make the said "Order *in re* Review of Referee's Order, and Memo of Decision" under the provisions of Section 39(c) of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 67c).

This court has jurisdiction by virtue of the provisions of Section 24(a) of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 47a) and General Order in Bankruptcy No. XXXVI.

Statement of the Case.

MANNER IN WHICH QUESTIONS HAVE BEEN RAISED:

This is an appeal from that portion of the order and judgment of the Honorable Paul J. McCormick, Judge of the District Court of the United States for the Southern District of California, Central Division [Tr. pp. 102-105], made and filed in said District Court December 29, 1941, approving and adopting the findings of fact and conclusions of law, and confirming the order, of the referee in bankruptcy made and filed by him June 6, 1941, in so far as the same refers and applies to the personal property described as "Parcel Two." [Tr. pp. 62-63, 97-98.] The correctness of appellee's position with respect to Parcels One and Three are conceded. [Tr. p. 75.]

QUESTION INVOLVED:

Has appellant complied with the provisions of section 2980, Civil Code of California, with respect to the recording of its conditional sales contract so as to have a valid lien or interest in certain mining machinery and equipment therein described (Parcel Two) as against the appellee?

Specification of Errors Upon Which Appellant Relies.

Appellant specifies five errors in support of its appeal. The first four alleged errors (pars. a, b, c and d, respectively, appellant's opening brief, pp. 7-9) are based upon the proposition that the *evidence* presented to the referee was not sufficient to justify the findings of fact and conclusions of law and order of the referee.

The fifth alleged error (par. e, appellant's opening brief, p. 9) has to do with the question as to whether or not appellant has properly recorded its said contract of conditional sale in view of the provisions of sections 2980 and 2959a and 405 of the Civil Code of the State of California.

Summary of Argument.

I. The evidence presented to the referee fully supports the findings of fact, and justifies the conclusions of law and order, of the referee.

1. Referee's summary of evidence is presumed to be correct;

2. The judge must accept the findings of fact of the referee since appellant has not shown them to be clearly erroneous.

II. The conditional sales contract of appellant is void as to the lien or interest claimed by appellant in the machinery and equipment described as Parcel Two, because:

1. For the purpose of the recording laws, as expressed in Civil Code of California, sections 2980 and 2959a, the bankrupt resided in Los Angeles County at the time it executed the said contract; and

2. Appellant failed to record the said contract in Los Angeles County.

III. Recording statutes are remedial and should be liberally construed so as to attain the object intended by them.

IV. Appellant's authorities are not in point and are contrary to the decisions of this state.

(All emphasis herein ours unless otherwise noted.)

ARGUMENT.

I.

The Evidence Presented to the Referee Fully Supports the Findings of Fact, and Justifies the Conclusions of Law and Order, of the Referee.

1. REFEREE'S SUMMARY OF EVIDENCE IS PRESUMED TO BE CORRECT.

Inasmuch as the appellant did not present to the District Court, and has not presented to this court, a transcript of any portion of the evidence presented to the referee, it was assumed by the said District Court, and it should be assumed by this court, that the summary of the evidence as set forth by the referee in his "Certificate by Referee to Judge" [Tr. pp. 79-84] is correct.

It is the duty of the referee, when a petition for review is filed, to compile the record and certify it, with a summary of the evidence, to the court. If any party is not satisfied with the contents of the record and summary of the referee, timely objections should be made and amendments proposed. (*In re Burntside Lodge*, 7 F. Supp. 785, 26 A. B. R. (N. S.) 59 (1934; D. C. Minn.); Vol. 8, *Rem. Bank*. 29.)

The referee's summary of the evidence should be assumed to be correct in the absence of affirmative proof of error, and of request for further certification. (*In re Louis*, F. Supp., 37 A. B. R. (N. S.) 79 (1938; D. C. Cal.).)

2. THE JUDGE MUST ACCEPT THE FINDINGS OF FACT OF THE REFEREE SINCE APPELLANT HAS NOT SHOWN THEM TO BE CLEARLY ERRONEOUS.

“Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact *unless clearly erroneous*. The judge, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.” (*Gen. Orders in Bankruptcy No. XLVII.*)

By General Order XLVII (see 11 U. S. C. A. foll. Sec. 53) the judge is required to accept the referee’s findings of fact unless clearly erroneous. When the judge reviews on the record, the presumption is that the findings of fact by the referee are correct. This is the usual presumption made by appellate courts. General Order XLVII, as applicable to petitions for review, merely states the rule recognized by all circuits prior to its promulgation. (*In re Byrd Coal Co.*, 83 F. (2d) 190, 31 A. B. R. (N. S.) 241 (1936; C. C. A. N. Y.).)

If the findings are incomplete, there is a presumption that the referee acted rightly. This is the general presumption in favor of the validity of the proceedings of a court. (*Cooper v. Dasher*, 290 U. S. 106, 78 L. Ed. 203, 54 S. Ct. 6, 23 A. B. R. (N. S.) 667 (1933); *In re Shea*, 126 F. 153, 11 A. B. R. 207 (1903; C. C. A. Mass.).)

“If there was evidence to support findings contrary to those made by the court, it is not in the record before us, and the responsibility therefor rests with the appellant upon whom weighed the burden of presenting to this court a proper record.” (*United States v. Foster*, 123 F. (2d) 32, 34.)

“As against a claimed lack of evidence, which lack does not appear from the record, we must indulge the presumption that the District Court correctly decided all issues before it which might depend upon the factual evidence. (*In re Silverstein* (C. C. A. 9th), 35 F. (2d) 497, 499, 15 A. B. R. (N. S.) 85.)

“Assignments of error which raise questions on the evidence when the evidence is not in the record call for affirmance, not dismissal.” (Vol. 8, *Rem. on Bank.*, p. 104.)

“We bear in mind the fact that this case involves an order of the referee based upon a finding of fact as to *intention*. When confirmed by the District Court, such an order should not be set aside on anything less than a demonstration of plain mistake. *Fruehauf Trailer Co. v. Bridge*, 84 F. (2d) 660, 663 (C. C. A. 6th).” (*Johns-Manville Sales Corp.’s Petition*, 88 F. (2d) 520 (1937; C. C. A. Mich.) *Allen, C. J.*)

II.

The Conditional Sales Contract of Appellant Is Void as to the Lien or Interest Claimed by Appellant in the Machinery and Equipment Described as Parcel Two, Because:

1. FOR THE PURPOSE OF THE RECORDING LAWS, AS EXPRESSED IN CIVIL CODE OF CALIFORNIA, SECTIONS 2980 AND 2959A, THE BANKRUPT RESIDED IN LOS ANGELES COUNTY AT THE TIME IT EXECUTED THE SAID CONTRACT; AND
2. APPELLANT FAILED TO RECORD THE SAID CONTRACT IN LOS ANGELES COUNTY.

The said conditional sales contract was never recorded in Los Angeles County [findings of referee, Tr. p. 91] and it is conceded that appellee is within the class of persons described as "*bona fide* purchasers, encumbrancers, and those having no actual knowledge of the contract who become creditors of the buyer while said property is in the possession of the buyer."

Appellant admits that the said contract is void as to the lien or interest claimed by it in the machinery or equipment therein described if, at the time of the execution of said contract (May 23, 1938), the bankrupt resided in Los Angeles County, as the term is used in sections 2980 and 2959a, Civil Code of California.

The pertinent provisions of said section 2980, *Civil Code*, are as follows:

"Every conditional sales contract . . . of equipment and machinery used or to be used for mining purposes, must be . . . recorded within twenty

(20) days after its execution in the office of the recorder of the county *where the buyer . . . resides at the time he executes such contract . . .* and . . . in the county where the property is situated, otherwise, it shall be void as to the lien, or interest of the seller . . . against *bona fide* purchasers, encumbrancers, and those having no actual knowledge of the contract . . . who become creditors of the buyer . . . while said property is in the possession of any of the last-mentioned parties (the buyer) . . .

“Sections 2959a and 2965 of the Civil Code are hereby made applicable to the instruments required to be recorded by this section in the same manner as to mortgages of personal property.”

Section 2959a of said Civil Code provides as follows:

“Where the mortgagor of personal property or crops is a corporation or a partnership *the county of residence thereof* for the purpose of recording such mortgage *shall be deemed to be the county wherein such corporation or partnership has its principal place of business within this state.*”

The county wherein the bankrupt had its principal place of business within this state was Los Angeles County [Referee's Summary of Evidence, Tr. pp. 80-82; Findings of Referee, Tr. pp. 85-88], and, in accordance with the provisions of section 405 of the Civil Code of California, the bankrupt, on September 1, 1937, duly filed its statement in the office of the Secretary of State of the State of California stating that “the location and address of the principal office of said corporation within the State of California is Bay Cities Building, 225 Santa Monica Boulevard, in the City of Santa Monica, County of Los

Angeles, State of California". and that the name of the person residing in the state upon whom process directed to said corporation may be served is W. J. Shaw, giving his address, as provided by Civil Code section 405, to be in Los Angeles County. [Findings of Referee, Tr. p. 87.]

Therefore, it clearly appears that *for the purpose of the recording laws of this state*, as set forth in Civil Code of California, sections 2980 and 2959a, Los Angeles County was the place of residence of the bankrupt within this state and failure to file the said conditional sales contract in Los Angeles County rendered void the said contract as to the lien or interest claimed by appellant in the said mining machinery and equipment.

In arguing in support of appellee's position, it would be difficult to improve upon the language used by the Honorable Paul J. McCormick in his said order [Tr. pp. 103-105]:

"We regard the question for decision as so clear under the record before us and under the laws of California which unquestionably control this matter that merely a brief statement in amplification of the foregoing order is sufficient.

"The referee has summarized the evidence as to the residential locale of the corporation bankrupt at all times applicable to the inquiry before the court. It is unnecessary in this memorandum to restate the facts or to do more than state that with the exception of the initial legal processes of organizing the corporate body in the State of Nevada, *every substantial activity and function of the Jumbo Consolidated Mining Company has been carried on and performed within the State of California.*

“The question of residence is one of intent and the purpose of the bankrupt corporation relative to its commercial domicile while doing business in California has been definitely shown to have been at all times the County of Los Angeles.

“It is also significant and highly informative as to the corporation’s expressed residential intent that in Paragraph Second of the articles of incorporation after providing that the principal office of the corporation in Nevada is in the City of Reno, it is stated ‘but that this corporation may maintain an office or offices in such other place or places, within or without the State of Nevada, as may from time to time be designated by the board of directors or by the by-laws of this corporation, and that this corporation may conduct all corporate business of every kind and nature, including the holding of meetings of directors and stockholders, outside of the State of Nevada, the same as though conducted within the State of Nevada.’ This declaration even in the fundamental instrument creative of the corporate existence of the bankrupt company, followed by the indisputable location of the office of the corporation at Los Angeles County and other factors shown by the evidence and found by the referee, indicate that although formed in Nevada, the bankrupt corporation was for all practical and commercial purposes a California corporation which had its principal place of business in California in Los Angeles County.

“In the language of the Supreme Court of California in its decision in *Wait v. Kern River Mining etc. Co.*, 157 Cal. 16, the bankrupt mining company now before this court ‘is a foreign corporation only in the sense that it is created in another state and continues

to enjoy corporate life by permission of that state. In every other sense it is solely a California corporation. So far as it in fact does or can do business at all, it does it solely by permission of this state, and within its borders. *Under such circumstances its residence . . . anywhere else outside of California, is the merest fiction.* See, also, late California Appellate Court decision in *Sharp v. Big Jim Mines*, 39 C. A. (2d) 435, to the same effect.

“It is true that neither of the two state court decisions pertain directly to the ‘recording statutes’ of California, such as sections 2980, 2959a or 2965 of the Civil Code of California. *We think, however, that the unaided language of these code sections when considered, as they must be in this matter involving a ‘foreign corporation’, with section 405 of the same code, undoubtedly make secure the correctness of the referee’s order under attack.*”

The case of *Wait v. Kern River Mining Co.* (157 Cal. 16), decided by Judge Angelotti December, 1909, was a case where the defendant corporation was organized and existing under the laws of Arizona *but all of its property was situate, and all of its business carried on*, in this state with its office in the City of Los Angeles. It was organized for the purpose of developing certain mining claims in Kern County. [This is precisely the same situation as shown in the summary of the evidence and found in the findings of fact of the Referee: Summary of Evidence, Tr. pp. 79-82; Findings of Referee, Tr. pp. 85-95.] On page 21, the court held:

“Defendant corporation was, as we have seen, organized under the laws of Arizona. *But for all practical purposes, according to the record, it is a*

California corporation. Its contemplated business was all to be transacted in this state, all of its property is here and it does business nowhere else. As was said by Judge Lurton of another corporation in *Young v. South Tredeger Co.*, 85 Tenn. 189, (4 Am. St. Rep. 752, 2 S. W. 202), 'its whole tangible and ponderable substance is in this state.' It is a foreign corporation only in the sense that it is created in another state and continues to enjoy corporate life by permission of that state. In every other sense, it is solely a California corporation. So far as it in fact does or can do business at all, it does it solely by permission of this state, and within its borders. Under such circumstances *its residence in Arizona, or anywhere else outside of California, is the merest fiction.* As to such a corporation, so organized and situated in regard to all its business and property, we can see no good reason why, as was said in the case last cited, 'the fiction as to the situs of the corporation entity ought not to yield in the interest of justice to the actual facts,' to an extent sufficient to warrant the holding that the corporation is sufficiently a resident of this state to bring it within the rule applicable to domestic corporations as to the situs of its stock."

The more recent case, *Sharp v. Big Jim Mining et al.*, 39 Cal. App. (2d) 435, decided June 10, 1940, is one where an action was brought to enjoin the levy of an assessment upon stock of the defendant corporation and where the court was called upon to determine its jurisdic-

tion over that corporation in view of its being organized in Arizona. However, it was organized to do business in California; *its principal place of business was in Los Angeles where all of its books and records were kept*; that for years last past *all the business of the corporation had been conducted in California* where it was interested in two mining properties. The court held that the general rule that courts will not interfere with the internal affairs of a foreign corporation (p. 439):

“whose foreignness is at best a metaphysical concept must fall before the practical necessities of the modern business world. In such cases the courts are inclined, in considering the questions of public policy and expediency to determine whether or not jurisdiction should be exercised, to look to the real, practical status of the corporation rather than its technical or mere nominal foreignness. Convenience, expediency and justice are to be determined, in part at least, by the location of the books, records, assets and the principal offices of the corporation, the place of residence of the directors and officers, and the place where its business is transacted.”

Also, on page 440, the court referred with approval to the above case of *Wait v. Kern River Mining Company*. The court further stated (p. 440):

“We therefore believe that it may safely be said that when a corporation is non-resident only in that it is the creation of another state—its officers, agents, books, place of business, business, and all its property

being within the jurisdiction of the court—policy and expediency do not require the court to deny relief in a proper case on the ground that the internal affairs of the corporation will be affected.”

As a matter of public policy there is all the more reason for this court to conclude that the Bankrupt has resided and has done business in the County of Los Angeles where the question involves the rights of creditors with regard to the recordation of liens and evidences of title.

For many practical purposes and the enforcement of internal rights, a foreign corporation may be considered a California or “resident” corporation. Thus one which holds directors’ meetings in California and does most of its business here, even though organized in another state, is for some purposes deemed a resident, so that stockholders may obtain jurisdiction over the corporation and its officers for the purposes of enforcing their rights in the internal management, such, for instance, as a right to inspect mining property, though located in another state. *Hobbs v. Tom Reed etc. Co.*, 164 Cal. 497, 43 L. R. A. (N. S.) 1112, 129 Pac. 781, in which the court held (p. 500):

“The corporation holds its directors’ meetings in this state, its directors reside here and the corporate business, in part, at least, is done here. *The corporation, although organized under the laws of Arizona, is for many purposes a resident of this state.* (Wait v. Kern R. M. Co., 157 Cal. 21 (106 P. 98).)”

A similar situation was present in the case of *Stabler v. El Dora Oil Co.*, 27 Cal. App. 516 (150 Pac. 643), in which the court held (p. 520):

“In the case at bar the respondents, as directors of the corporation and charged with the performance of a duty to the stockholders, are all residents of this state, and as such board of directors they transact all the business of the corporation, not in Arizona, but in California. The resolution calling the election can be and, if passed at all, no doubt will be adopted at a meeting of the board held at its offices in Los Angeles, where it appears all its meetings have been held and all of the corporate acts other than that here involved have been performed. Since all of the members of the board of directors reside in this state, wherein all its property is situate and all its corporate business, including that of its board of directors, is transacted, *the corporation, although organized under the laws of Arizona, must be deemed a resident of this state and subject to the jurisdiction of the courts thereof.* . . . This view finds ample support in the following authorities: *Hobbs v. Tom Reed G. M. Co.*, 164 Cal. 497, (43 L. R. A. (N. S.) 1112, 129 Pac. 781); *Wait v. Kern River Mining etc. Co.*, 157 Cal. 16, (106 Pac. 98); *Potomac Oil Co. v. Dye*, 10 Cal. App. 534, (102 Pac. 677); 14 Cal. App. 674, (113 Pac. 126, 130).”

III.

Recording Statutes Are Remedial and Should Be Liberally Construed So as to Attain the Object Intended by Them.

“ . . . recording statutes are remedial and should be liberally construed *so as to attain the object intended by them*. The design of recording laws is to prevent fraud in transactions *by securing certainty and publicity in such dealings*; their whole object is to permit and require the public to act with the presumption that recorded instruments exist and are genuine; and they should not be construed to produce fraud, but so as to prevent it. The public policy upon which registration laws are founded favors an interpretation and construction which will encourage confidence in records rather than suspicion, doubt, or uncertainty.” (53 C. J. 606.)

IV.

Appellant's Authorities Are Not in Point and Are Contrary to the Decisions of This State.

In spite of the controlling effect of the said decisions of this state, it may be well to point out the distinctions between the case at bar and the cases cited by appellant. *Matter of A & B Oil Co.*, 95 F. (2d) 946:

Appellant admits this case is not in point.

Babcock & Wilcox Co. v. Spaulding (1936, C. C. A. 1st), 86 F. (2d) 256):

Was a case wherein Babcock & Wilcox Co., and Cameron Machine Company, appellants, filed petitions for leave to repossess property sold to the debtor under conditional sales contract as against the trustee in bank-

ruptcy. The District Court refused to permit appellants to repossess the property under their conditional sales contract and they appealed and the Circuit Court affirmed the judgment of the District Court.

Cameron Machine Company was a New York corporation; the Babcock & Wilcox Co. was a New Jersey corporation; the bankrupt was a Maine corporation having its principal office at Portland, Maine.

After its incorporation the bankrupt registered as a foreign corporation in New Hampshire "where it had mills of a substantial value". It does not appear whether or not the bankrupt had done, or was doing, business in Maine and for that reason had actually a business situs, or residence, in Maine, or whether, as in the case at bar, the bankrupt was organized in Maine solely for the purpose of doing business in New Hampshire, and had all of its corporate assets and books and records, and held all of its meetings, in New Hampshire.

In re Brown, 14 F. Supp. 251:

This is the decision of the district judge which was considered by the Circuit Court in the above case of Babcock & Wilcox Co. As appears from the decision of the District Court, the most that can be said as to the reason for incorporating in Maine, or with regard to the amount of business done in New Hampshire, is that "it did a large part of its manufacturing business in New Hampshire". (p. 253.) This is far from the finding that the bankrupt was incorporated in Maine solely for the purpose of doing business in New Hampshire, and that all of its business was carried on in New Hampshire. In fact, the point involved in the case at bar was not con-

sidered by either the District or the Circuit Courts and, of course, could not have been considered in view of the facts in those cases.

Whitney v. Browne, 180 Mass. 597, 62 N. E. 979:

This case appears not to be in point on any question involved herein.

Ward v. Southern Sand & Gravel Co., 33 F. (2d) 773:

This was a case in equity receivership where The Thew Shovel Co. petitioned for the release of certain property in the hands of a receiver. Its petition for the release of the property was denied. The purchaser of the property under a conditional sales contract was the Southern Sand and Gravel Company and the said Thew Shovel Co. was the seller. The said purchaser was a Delaware corporation, doing business in North Carolina. Its chief business was mining and selling sand and gravel. It does not appear that the purchaser was organized in Delaware solely for the purpose of doing business, and that it was only doing business in the State of North Carolina. In other words, the distinctions between that case and the case at bar are similar to those of the *Babcock* case. Consequently, the main issue involved herein, and the main issue discussed in the *Wait* case (157 Cal. 16), *supra*, and the *Sharp* case (39 Cal. App. (2d) 435), *supra*, and the other cases cited by appellee is not discussed.

The court does say, however (p. 774) that the Legislature,

“in C. C., Sec. 3311, designates the principal place of business of a domestic corporation as its residence for the purposes of this section, *but makes no refer-*

ence to a foreign corporation licensed to do business in this state, the reasonable inference is that the Legislature treated such corporations as non-residents."

Therefore, it appears that the law upon which that case was decided had to do only with domestic corporations.

Conclusion.

In view of the foregoing, it is respectfully submitted that the decision of the District Court appealed from should be affirmed.

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No. 10,073

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WESTERN-KNAPP ENGINEERING Co.

(a corporation),

Appellant,

vs.

O. T. GILBANK, Trustee of the Estate of
Jumbo Consolidated Mining Company
(a corporation), Bankrupt,

Appellee.

REPLY BRIEF FOR APPELLANT.

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CLERK

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(a corporation), Bankrupt,

Appellee.

REPLY BRIEF FOR APPELLANT.

ARGUMENT.

I.

THERE IS ONLY ONE POINT INVOLVED IN THIS APPEAL, AND THAT IS WHETHER THE BANKRUPT-BUYER (A FOREIGN CORPORATION) WAS A "RESIDENT" OF THE STATE OF CALIFORNIA WITHIN THE MEANING OF SECTION 2980 AND RELATED PROVISIONS OF THE CALIFORNIA CIVIL CODE SO AS TO REQUIRE THE RECORDING OF THE CONTRACT OF CONDITIONAL SALE IN LOS ANGELES COUNTY.

(A) THERE IS NO EVIDENTIARY PROBLEM INVOLVED.

The appellant herein has pointed out (Brief for Appellee, p. 4) that we have specified *five* errors in support of our appeal, and that *four* of these are based

upon the proposition that the evidence presented to the Referee was not sufficient to justify the findings of fact and conclusions of law and order of the Referee.

So far as the actual *facts* are concerned, we have no quarrel with the Referee's summary of the evidence. We do claim, however, that, based upon that evidence, the Referee's conclusion that the bankrupt-buyer was a "resident" of the State of California at the time of the recordation of the Contract of Conditional Sale, is entirely unsupported.

In other words the evidence shows, without dispute, that the bankrupt-buyer was a *foreign* corporation. As such, we contend that no other evidence contained in the record can show that it is a "resident" of the State of California as that word is used in Section 2980 of the Civil Code and its related sections.

(B) THE PROBLEM PRESENTED IS STRICTLY A LEGAL PROBLEM.

The issue involved in this case is squarely joined on the proposition of whether a foreign corporation, licensed to do business in this state, is a "resident" or "non-resident" within the meaning of California Civil Code Section 2980. Appellee contends that the bankrupt-buyer was a "resident"; we contend that said bankrupt-buyer was a "non-resident".

The evidence relating to "residence" shows only the following factors:

(a) *The bankrupt is a corporation duly organized and existing under and by virtue of the State of*

Nevada, and at all times since September 1, 1937, has been qualified to do business, *and has done and carried on business*, in the State of California. (T. R. p. 79.)

(b) The Articles of Incorporation provide that the principal office of the corporation in Nevada is in the City of Reno, "but that this corporation may maintain an office or *offices* in such other place or *places*, *within or without* the State of Nevada, as may from time to time be designated by the Board of Directors or by the By-Laws of this corporation and that this corporation may conduct all corporate business of every kind and nature, including the holding of meetings of directors and stockholders, *outside* the State of Nevada, the same as though conducted in Nevada." (T. R. pp. 79-80.)

(c) Except for the organizational meeting held at Reno, there have been five other directors' meetings, all of which have been held in the County of Los Angeles. (T. R. pp. 80-81.)

(d) The bankrupt is qualified to do business in California and has designated the County of Los Angeles as the "location and address of the *principal office* of said corporation *within the State of California*" as required by Civil Code Section 405. (T. R. pp. 81-82.)

(e) All the books and records of the corporation have always been kept in Los Angeles County, except those required by the laws of Nevada to be kept in Reno. (T. R. p. 82.)

The above mentioned points are the only facts in the record upon which the Referee could base his findings "that said purported contracts of conditional sale and said purported conveyances are fraudulent and therefore void as against the trustee in bankruptcy herein". (Finding No. 13; T. R. p. 94.)

The problem, therefore, is really a legal one despite the fact that it does arise from what we claim to be a misapplication of the above-enumerated evidentiary factors.

**(C) APPELLEE HAS FAILED TO QUOTE THE PERTINENT PARTS
OF CALIFORNIA CIVIL CODE SECTION 2980.**

On Pages 9-10 of the Brief for Appellee, the appellee has quoted *only* that portion of California Civil Code Section 2980 which has to do with the requirements of recordation as far as "*residents*" are concerned. On page 5 of our Opening Brief we have quoted all portions of the code section having to do with the requirements for recordation where the buyer is (a) a "*resident*", or (b) "in case the buyer is a '*non-resident*' of this State". Since the sole issue in this case is whether or not the bankrupt-buyer was a "*resident*" or a "*non-resident*" within the meaning of the code section, we believe the recordation requirements for *both* of such classes of persons should be presented to the Court.

II.

EVEN IF BANKRUPT-BUYER CONDUCTS "EVERY SUBSTANTIAL FUNCTION AND ACTIVITY IN THE STATE OF CALIFORNIA", THIS FACT DOES NOT MAKE THE BANKRUPT-BUYER A "RESIDENT" OF THE STATE WITHIN THE MEANING OF SECTION 2980 OF THE CALIFORNIA CIVIL CODE.

(1) APPELLEE'S CASES DO NOT SUBSTANTIATE THIS THEORY.

The balance of the Brief for appellee is an attempt to prove, through the citation of certain legal authorities which will be hereafter discussed, that where a corporation has "all of its property . . . and all of its business (is) carried on" in a foreign state (Brief for Appellee, p. 13), it is nevertheless a "resident" of that foreign state within the meaning of recordation laws.

Let us examine each of the cases cited by the Appellee in support of this hypothesis for the purposes of determining whether or not any of said cases support such a theory:

(A)

Wait v. Kern River Mining Co., 157 Cal. 16.

In this action the plaintiff sought to obtain a decree in equity imposing a trust in his favor upon certain shares of stock held by the defendant, a corporation organized under the laws of Arizona. The question involved was whether or not the California courts had *jurisdiction* over such shares of stock for the purposes of making such a decree, it being conceded, as a matter of law, that such jurisdiction would vest only if said defendant corporation was a "resident" of this state. The

evidence disclosed that “all of its property was situate, and all of its business (was carried on) in this state”. The Court said (p. 21):

“As to such a corporation, so organized and situated in regard to all of its business and property, we can see no good reason why, as was said in the case last cited, ‘the fiction as to the *situs* of the corporation entity ought not to yield in the interest of justice to the actual facts’; to an extent sufficient to warrant the holding that the corporation is sufficiently a resident of this state to bring it within the rule applicable to domestic corporations as to the *situs* of its stock.”

The principles upon which the *Wait* case is based are entirely foreign to the matter at bar for the following reasons:

(a) The case holds that, for the purposes of acquiring *jurisdiction* over the *situs* of stock, a foreign corporation may be a “resident” of this *state*. It certainly does not hold that it can be a resident of any particular *county* within the state, which is the problem here. Moreover, it is axiomatic that a court desires to acquire *jurisdiction*, when that is the issue involved, for the purposes of following a fundamental policy of “putting an end to litigation”. If it did not acquire jurisdiction, the plaintiff would merely have to file a similar suit in Arizona to prove his claim. In the “interests of justice” this double litigation should be prevented.

(b) The *Wait* case contains definite evidence that “all of (the defendant corporation’s property) was situated, and all of its business carried on in this state”. The case at bar lacks any such evidence.

(B)

Sharp v. Big Jim Mining, et al., 39 Cal. App. (2d) 435.

This case is properly summarized by the appellee, and is distinguishable upon the identical grounds referred to above in our discussion of the *Wait* case. Although it is the general rule that courts will not interfere with the internal operations of a foreign corporation, there is no reason for a California Court to refuse to accept *jurisdiction* where the court actually has the means to enforce its orders. Thus, the court took upon itself the burden of solving certain *internal problems* of the Big Jim Mining Company by holding that such a corporation, under the circumstances, was sufficiently a "resident" of this *state* to enable the court to acquire jurisdiction. Again, the court was not asked to, nor did it hold that such a corporation could be a "resident" of any particular *county* within this state for *any* purpose, as the appellee is contending in the case at bar.

(C)

Hobbs v. Tom Reed etc. Co., 164 Cal. 497.

This case also needs no further comment other than it is distinguishable on the identical grounds mentioned above in our discussion of the *Wait* and *Sharp* cases.

each of the other forty-seven states to be determined by an examination of the amount of business each foreign corporation does in each county of each of forty-seven states? Or can the residential locale of foreign corporations within a state be determined by an examination of that corporation's activities within each of the forty-seven other states? According to the rule contended for by appellee, a prospective creditor in California must make an independent investigation of each foreign corporation in a hazardous attempt to determine how much business said foreign corporation does in the *state of its incorporation* in order to know whether a conditional sales contract involving mining machinery should be recorded under the requirements for "residents" or "non-residents" of California under the provisions of Section 2980 of the Civil Code. If confidence in public records is to be maintained, certainly such a rule cannot logically be supported.

Admittedly, it does not appear in the *Babcock* case that the bankrupt-buyer was "organized in Maine *solely* for the purpose of doing business in New Hampshire. Nor does *that* fact appear in this case.

Those two proposed lines of demarcation between the case at bar and the *Babcock* case having been exploded, the reasoning and rule of the *Babcock* case stands as clear, unequivocal law.

(B)

Appellee attempts to distinguish the *Ward* case on the ground that (Brief for Appellee, p. 20):

“It does not appear that the purchaser was organized in *Delaware* solely for the purpose of doing business, and that it was only doing business in the State of North Carolina.”

Again, let us say that *neither* of these facts are present in the record before this Court. Consequently, the case at bar cannot be differentiated from the *Ward* case on any such theory.

Appellee also argues that the *Ward* case had only to do with domestic corporations. This certainly is not true. The facts of that case disclose that the bankrupt-buyer was a *Delaware corporation doing business in North Carolina*, and was, of course, a foreign corporation.

Far from militating against our position, Appellee's quotation (Brief for Appellee, pp. 20-21) of the *Ward* case:

in C. S. Sec. 3311, designates the principal place of business of a domestic corporation as its residence for the purposes of this action, but makes no reference to a foreign corporation licensed to do business in this state, *the reasonable inference is that the Legislature created such corporations as non-residents.* (Italics ours.)

actually supports our position. Naturally, this is the “reasonable inference”. This is the “reasonable inference” to be deduced from section 2959a of the Civil Code.

With reference to the treatment of domestic and foreign corporations within the State of North Carolina the court said (p. 774 of the *Ward* case):

“If a domestic corporation is without a residence in any *one county* without legislative enactment fixing a residence, how could it be contended that a foreign corporation is a resident of any particular county in this state? The only inference deducible from the decisions of the highest court of the state and from the statutes is that *foreign corporations are treated as non-residents in this state*, and that the proper place for the recordation of mortgages executed by a foreign corporation is in the county where the personal property or some part thereof is situated.” (Italics ours.)

(C)

It should also be noted that Appellee did not even attempt to distinguish in his Brief, the reasoning of *Germania Fire Ins. Co. v. Francis* (Opening Brief for Appellant, p. 14), and *In Re Schollinberger* (Opening Brief for Appellant, p. 15) upon which we also strongly rely.

(3) APPELLEE'S THEORY IS PRACTICALLY UNSOUND AND PRESENTS AN UNWORKABLE RULE.

Appellee, in effect, contends that where every “substantial function and activity” of a foreign corporation is in the State of California, that corporation is a “resident” of the county designated by it (under sec. 405, Civil Code) as its “principal office”, for the purpose of the recordation requirements of Section 2980 of the Civil Code.

A theory so similar was presented to this Court in the case of *Matter of A & B Oil Co.*, 95 F. (2d) 946,

that we deem it well to refresh the court's recollection of this important case. It will be remembered that the Court then considered the problem of in what county in this state should a domestic corporation make recordation of its chattel mortgages. This court held that such recordation must be made in the county of the corporation's designated principal place of business, such county being the "residence" of a *domestic* corporation for the purposes of the recording laws. The facts of the case were that *all* operations of the bankrupt corporation other than the keeping of its books, its banking, and the taking of receipts and making of disbursements was done in Santa Barbara County. Its designated principal office of business was Los Angeles County. On page 947 of the opinion the Court says:

"Appellant contends that the corporation's residence is the county where it carries on the principal part of its operations. It argues that the 'principal office for the transaction of the business' required by the statute to be designated by the articles of incorporation is something distinct from the 'principal place of business' and that the principal place of business is the county where the greater portion of corporate activities is carried on. It then argues that the 'principal place of business' as distinguished from the statutory 'principal office for the transaction of business' is the residence of the corporation for the purposes of chattel mortgage recordation.

"It was long settled in California that a domestic corporation's residence is the county designated in its articles. We do not find that the Courts of California have ever looked with favor

upon a distinction between 'principal place of business' and 'principal office for the transaction of business'.

"In 1865 the California corporation law required the articles of incorporation to designate 'the principal place of business'. In *Harris v. McGregor*, 29 Cal. 124, 128, in considering this provision, the court said: 'But the "operations" of a corporation may be carried on in one county and their principal place of business within the meaning of the state be in another and distinct county . . . The "principal place of business" contemplated and intended by the statute is the principal office of the corporation at which the books of the corporation are kept and the officers usually and ordinarily meet for the purpose of managing the affairs and transacting the business of the corporation.

"And in *Creditors v. Consumer's Lumber Co.*, 98 Cal. 318, 319, 33 P. 196, 197, the court said: 'The principal place of business of a corporation, as stated in its articles, is its residence; but, as in the case of an individual, its actual place of business, its scene of operations, the place where it buys and sells, may be a county entirely different from its place of residence.'

"To the same effect are *Gallup v. Sacramento & San Joaquin Drainage District*, 171 Cal. 71, 74, 151 P. 1142 and *Cook v. W. S. Ray Manufacturing Co.*, 159 Cal. 694, 698, 115 P. 318.

"We have neither reason nor authority for holding that this settled law to the effect that a corporation's residence is as stated in its articles has been changed by the amendment, Civil Code Cal. Sec. 290, subd. 3, which requires the articles

to indicate the county 'where the principal office for the transaction of the business of the corporation is to be located.'

"We do not conceive that this slight amendment of the wording has the effect of *shifting a corporation's residence from its principal office to the scene of its major operations. So to hold would make the protection afforded by the recordation of chattel mortgages a vain thing and a laughing stock in the case of a corporation carrying on industrial operations in more than one county. A prospective mortgagee would be required first to record the mortgage in the county where the property was situated and would then have to determine the corporation's residence by a careful survey and determination of which of California's more than fifty counties housed the largest proportion of his debtor's activities.*" (Italics ours.)

The very same reasoning is certainly applicable to the appellee's contention here. If Appellee's hypothesis is correct, every conditional vendor of mining machinery, when dealing with foreign corporations doing business in this state, must hazard a guess as to whether or not "every substantial function and activity" of *each* of the foreign corporations, with which it does business in California, is being conducted in this state, in order to be sure whether such foreign corporations are "residents" or "non-residents" within the meaning of the recording statute.

For example, let us take this hypothetical case: X corporation is organized under the laws of Nevada, but has qualified to do business in California and has designated the County of Los Angeles as its principal

office for the transaction of business. X corporation, besides doing business in California, does a similar amount of business in every other state in the union except Nevada. Who can say in which state (if any) it has such "substantial function and activity" as to make it a "resident" of that particular state for the purposes of the recording laws? Such a rule would require just as much an independent investigation of each foreign corporation's activities in this state in order to determine the proper county for the recordation of contracts as would be necessary if the rule were applied to a domestic corporation's activities in each of the fifty-eight counties in California. Conditional vendors are entitled to know before hand in what county they are required to record their contracts; it should not be necessary for a court of law to decide each of these cases individually.

If the rule is as we contend it should be, then, in every case involving a foreign corporation, licensed to do business in this state, the contracts of conditional sale would be recorded only "where the property involved is located at the time the contract is executed by the buyer". This rule is simple, clear, and in strict accordance with all the federal cases involving the residence of a foreign corporation for the purpose of recording statutes.

The citation from *Corpus Juris* contained in Appellee's own brief (Brief for Appellee, p. 18) substantiates our analysis. If there is to be any *certainty* regarding recordations, a recording statute should not be construed so as to necessitate individual investigations of each foreign corporation doing business

in this state in a hazardous attempt to determine how "substantial" its activities are here. The reasoning of the *A & B Oil Company* case applies as strongly to foreign corporations as it does to domestic ones. If conditional vendors of *domestic* corporations must know definitely where to record their contracts, conditional vendors of *foreign* corporations are entitled to the same privilege.

So far as the "publicity" of recordations is concerned, what is more likely than a prospective creditor's examination of the public records of the County in which the "property involved is located" in the case of foreign corporations? The statute itself makes it necessary that a "contract of conditional sale of equipment and machinery used or to be used for mining purposes shall *also* be recorded in *every* case in the county where the property is situated". In other words, in the case of "residents" there is a *dual* recordation required (unless the county of residence is also the county where the property is located); in the case of "non-residents" a recordation in the county where the property is "located" is sufficient of and by itself. It is therefore perfectly obvious that the legislature considered a recordation in the county where the property is "situated" to be of more publicity value than a mere recordation in the county of "residence". Thus, in all cases involving machinery "used or to be used for mining purposes" a single search through the records in the county where the property is located will disclose to the prospective creditor whether or not that property is covered by a contract of conditional sale.

CONCLUSION.

In concluding, we can find no more appropriate summary of the "residential" status of a foreign corporation than is contained in the recent New Hampshire Supreme Court decision of *Blanchette v. New England Telephone & Telegraph Co.* (1939), 6 Atl. (2d) 161, 162:

"As applied to corporations the adjectives 'foreign' and 'non-resident' are usually regarded as synonymous. 27 Columbia Law Rev. 12, 13, note. A corporation has its residence and domicile in the state in which it is incorporated, and if it extends its activities to another jurisdiction it 'is in the same position as any non-resident who sends his agents into a state to do business for him'. Beale, Foreign Corporation, Sec. 73.

"Nor does the fact that a corporation has complied with all statutory provisions prescribed by a foreign state as prerequisites of the right to do business there make the corporation a resident of that state in the sense in which the word "resident" is used in the statutes relating to the venue of actions. . . .

"In the recent case of *Babcock, etc. Co. v. Spaulding* (1 Cir.), 86 F. (2d) 256, the Circuit Court of Appeals held that a Maine corporation which owned and operated mills in New Hampshire was not a resident of this state within the meaning of P. L. c. 216, Sec. 27, 28, 30, relating to conditional sales of personal property . . ."

In view of the foregoing, it is respectfully submitted that the Order of the District Court made on December 29, 1941, should be, by this Court reversed,

with instructions to said District Court to enter an Order Denying the Trustee's Petition to Recover Assets and granting to the appellant the relief prayed for in its Answer thereto.

Dated, San Francisco,
May 29, 1942.

Respectfully submitted,

ARTHUR P. SHAPRO,

Attorney for Appellant.

HAROLD A. BLOCK,
Of Counsel.

TRANSCRIPT OF RECORD

5
Supreme Court of the United States

October Term, 1943

No. 10110

ROBERT EARL HOPPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**UPON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NO. 10110

United States
Circuit Court of Appeals
For the Ninth Circuit.

ROBERT EARL HOPPER,
Appellant,
VS.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

**Upon Appeal from the District Court of the United
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ATTORNEYS OF RECORD

CHARLIE W. CLARK

1930 West Adams Street

Phoenix, Arizona

Attorney for Appellant

FRANK E. FLYNN, United States Attorney,
Federal Building

Phoenix, Arizona

Attorney for Appellee [3*]

In the District Court of the United States
for the District of Arizona

C 6163 Px

INDICTMENT

Viol. 50 U. S. C. 311 (Selective Training &
Service Act of 1940)

United States of America,
District of Arizona—ss.

In the District Court of the United States in and
for the District of Arizona, At the November term
thereof, A. D. 1941.

The Grand Jurors of the United States, impan-
eled, sworn, and charged at the term aforesaid, of
the Court aforesaid, on their oath present, that
Robert Earl Hopper, having theretofore registered

*Page numbering appearing at foot of page of original certified
Transcript of Record.

under the Selective Training and Service Act of 1940, on or about *or about* the 22nd day of June, A. D. 1941, and within the said District of Arizona, did knowingly, wilfully, unlawfully and feloniously fail and neglect to perform the duty required of him under and in the execution of said Act, and the rules and regulations made pursuant thereto, that is to say, that the said defendant, Robert Earl Hopper, having been theretofore classified by his local draft board at Prescott, Arizona, as a conscientious objector, and found fit for general service, did then and there, knowingly, wilfully, unlawfully and feloniously fail and neglect to report as a conscientious objector for civilian work of national importance when notified so to do by his local draft board; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

United States Attorney for
the District of Arizona

H

Indictment

A True Bill

WALTER W. BAILEY,

Foreman of the Grand Jury

[Endorsed]: Filed Dec. 12, 1941. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard. Deputy Clerk. [4]

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF
MONDAY, FEBRUARY 2, 1942
(Phoenix Division)

October 1941 Term

at Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

This case comes on regularly for arraignment this day.

George E. Wood, Esquire, Assistant United States Attorney, appears for the Government. The defendant, Robert Earl Hopper, is present in person with his counsel, Charlie Clark, Esquire, and is now duly arraigned. The defendant waives the reading of the indictment and a copy thereof is handed to him. On motion of said counsel for the defendant,

It Is Ordered that this case be continued for plea until Monday, February 9, 1942, at ten o'clock a. m.

[5]

[Title of District Court and Cause.]

MOTION TO QUASH INDICTMENT

Now Comes the Defendant above named by his Attorney Charlie W. Clark, and moves to quash the Indictment in the above entitled cause on the grounds and for the reasons:

I

That the indictment does not state facts sufficient to constitute a crime or offense.

II

That the Statute is Unconstitutional and void and attempts to deprive defendant of his liberty without due process of law and attempts to subject defendant to involuntary servitude;

III

That the Statute is Unconstitutional and void in that it unlawfully attempts to delegate legislative authority to an executive officer.

CHARLIE W. CLARK

Attorney for Defendant

Phoenix, Arizona,

February 7, 1942.

CHARLIE W. CLARK,

Attorney for Defendant,

1930 West Adams St.,

Phone—4-3744.

Service of above motion acknowledged this 7th day of February, 1942.

F. E. FLYNN

United States Attorney,

By R. HARRIS

[Endorsed]: Filed Feb. 7, 1942. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [6]

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF
MONDAY, FEBRUARY 9, 1942
(Phoenix Division)
October 1941 Term

At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

This case comes on regularly for plea this day.

George E. Wood, Esquire, and Cecil A. Edwards, Esquire, Assistant United States Attorneys, appear for the Government. The defendant, Robert Earl Hopper, is present in person with his counsel, Charlie W. Clark, Esquire.

Defendant's Motion to Quash, heretofore filed herein, is now argued to the Court by counsel for the defendant, and

It Is Ordered that said Motion be submitted and by the Court taken under advisement, and that this case be continued for plea until after ruling on said Motion. [7]

ert Earl Hopper, is present in person with his counsel, Charlie W. Clark, Esquire. Louis L. Billar is present as court reporter.

The Government now announces ready for trial.

Counsel for the defendant announces not ready for trial for the reason that the defendant has had no opportunity to present defense and is denied a fair and impartial trial.

There being but twenty-six jurors in attendance on this Court, on stipulation of respective counsel,

It Is Ordered that the record show that counsel for the Government waives two peremptory challenges.

A lawful jury of twelve men is now duly empaneled and sworn to try this case.

Thereupon, It Is Ordered that all jurors not empaneled in the trial of this case, be excused for the term.

The said United States Attorney now reads aloud the indictment to the jury and thereafter said counsel for the Government states to the jury the defendant's plea of not guilty to said indictment.

Said counsel for the Government now states the Government's [10] case to the jury and counsel for the defendant reserves statement to the jury.

Government's Case

Gerald T. Bigaouette is now duly sworn and examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence:

1. Selective Service Registration Card.
- 2-A. Portion of line 217 of Classification record.
4. Form of notice to registrant.
5. Report of physical examination.
6. Form of notice to registrant.
7. Letter.
8. Form for conscientious objector.
9. Copy of letter.

Harry F. Dise is now duly sworn and examined on behalf of the Government.

Government's exhibit 3, Selective Service Questionnaire, is now admitted in evidence.

Thereupon, at twelve o'clock noon, It Is Ordered that the further trial of this case be continued until 1:30 o'clock p. m. this day, to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused.

Subsequently, at 1:30 o'clock p. m., the jury and all members thereof, the defendant and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Government's Case Continued

Harry F. Dise, heretofore sworn, is now recalled and further examined on behalf of the Government.

The following Government's exhibits are now admitted in evidence: [11]

2-B. Balance of line 217 of Government's exhibit 2 for identification, and title and heading of columns thereof.

10. Copy of letter and conscientious objector report.

11. Assignment to work of national importance.

12. Copy of order to report for work of national importance.

Nellie Prince is now duly sworn and examined on behalf of the Government.

Government's exhibit 14, transcript of proceedings before Local Board, is now admitted in evidence.

Harry F. Dise, heretofore sworn, is now recalled and further examined on behalf of the Government.

Whereupon, the Government rests.

Thereupon, at three o'clock p. m., the jury being first duly admonished by the Court, is excluded from the court room.

Counsel for the defendant now moves for a directed verdict of not guilty on the following grounds.

1. Indictment is fatally defective and does not charge a public offense.

2. The statute on which the indictment is based is unconstitutional and void.

3. That no public offense or crime has been proved against defendant.

4. Board has acted arbitrarily and capriciously in classification.

5. No proof of notice to defendant.

It is ordered that said motion be and it is denied, and that an exception be allowed the defendant.

Whereupon, the jury and all members thereof return into court at 3:10 o'clock p. m., and further proceedings of trial are had as follows:

Counsel for the defendant now states the defendant's case to the jury.

Defendant's Case:

Robert Earl Hopper is now duly sworn and examined in his own behalf.

Defendant's Exhibit D. four registry return receipts, is now admitted in evidence. [12]

The following defendant's witnesses are now duly sworn and examined:

Edward Bucey

Ferne Hopper

And the defendant rests.

Both sides rest.

Thereupon, at 4:00 o'clock p. m., it is ordered that the further trial of this case be continued until Saturday, March 28, 1942, at ten o'clock a. m., to which time the jury, being first duly admonished by the Court, the defendant and counsel are excused. [13]

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF
SATURDAY, MARCH 28, 1942
(Phoenix Division)

October 1941 Term

At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

The jury and all members thereof, the defendant and all counsel being present pursuant to recess, further proceedings of trial are had as follows:

Counsel for the defendant now renews motion for a directed verdict on the same grounds, heretofore given, and

It is ordered that said motion be and it is denied.

All the evidence being in, the case is argued by respective counsel to the jury.

The Court now duly instructs the jury.

Counsel for the defendant now requests the Court to read Title 50, Section 305d, United States Code, to the jury, which request is now refused by the Court, to which counsel for the defendant excepts. Counsel for the defendant further excepts to the Court's refusal to give defendant's requested instructions to the jury.

The jury now retire at the hour of eleven o'clock a. m., in charge of two sworn bailiffs to consider of their verdict.

On motion of said counsel for the Government, with the consent of counsel for the plaintiff,

It is ordered that the United States Attorney be allowed to withdraw any exhibits which are records of the Selective Service Board on substitution of certified copies thereof. [14]

Subsequently, the defendant and all counsel being present, the jury return in a body into open Court at the hour of 11:15 o'clock a. m., and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon, the Foreman reports that they have agreed and presents the following verdict, to-wit:

“C-6163 Phoenix

UNITED STATES OF AMERICA,

Plaintiff,

Against

ROBERT EARL HOPPER,

Defendant.

VERDICT

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Robert Earl Hopper, guilty as charged in the indictment.

ROYAL W. LESCHER,

Foreman.”

The verdict is read as recorded, and no poll being desired by either side, the jury is discharged from the further consideration of this case and excused from further trial jury service for the term.

It is ordered that this case be set for sentence April 6, 1942, at ten o'clock a.m., and that the defendant be allowed to remain on his present bond.

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF
MONDAY, APRIL 6, 1942

(Phoenix Division)

April 1942 Term

At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding

C-6163

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT EARL HOPPER,

Defendant.

This case comes on regularly for sentence this day.

George E. Wood, Esquire, and Cecil A. Edwards, Esquire, Assistant United States Attorneys, appear for the Government. The defendant, Robert Earl Hopper, is present in person with his counsel, Charlie Clark, Esquire, and now urges defendant's motion for new trial. Whereupon, the Court announces that said motion was not filed within the time required by law. The defendant is now duly informed by the Court of the nature of the crime charged in the indictment; of his arraignment on said charge, and of his plea of not guilty thereto

and of his trial and conviction thereof by jury, and no legal cause appearing why judgment should not now be imposed, the Court renders judgment as follows:

C-6163

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ROBERT EARL HOPPER,
Defendant.

Due proceedings having been had on the indictment filed herein presented against the defendant above named charging a violation of Title 50, United States Code, Section 311, unlawfully and feloniously failing to report as a conscientious objector for civilian work of national importance when notified to do so by local draft board,

It is ordered, adjudged and decreed that said defendant is guilty of said crime and in punishment thereof that said defendant be committed to the custody of the Attorney General of the United States or his duly authorized representative for imprisonment in such place of confinement as the said Attorney General shall designate for a term of two years.

It is further ordered that the Clerk deliver a certified copy [16] of this judgment and commitment to the United States Marshal or other

qualified officer and that the same shall serve as the commitment herein.

Dated at Phoenix, Arizona, April 6, 1942.

DAVE W. LING

Judge

[Title of Cause.]

Charlie Clark, Esquire, counsel for the defendant, now files defendant's Notice of Appeal and moves for stay of execution for a period of ten days, and

It is ordered that said defendant be remanded to the custody of the United States Marshal.

Subsequently, Charlie Clark, Esquire, appears for the defendant and moves for an order fixing bail and cost bond on appeal, and

It is ordered that defendant's bail and cost bond on appeal be fixed in the penal sum of \$750.00.

On motion of said counsel for the defendant,

It is ordered that said counsel be allowed to withdraw Notice of Appeal, heretofore filed, to permit filing of Notice of Appeal with statement of grounds for appeal included therein. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The name and address of Appellant is Robert Earl Hopper, Jr., Camp Verde, Arizona;

The name and address of Attorney for Appellant is Charlie W. Clark, 1930 West Adams Street, Phoenix, Arizona;

The offense alleged in the Indictment in the action appealed from is violation of Section 311 of Title 50, United States Code (Selective Service and Training Act of 1940).

The date of Judgment is April 6, 1942.

The sentence is that the Defendant *The Defendant* be committed to the Custody of The Attorney General of The United States to be incarcerated in such penal institution as said Attorney General may designate for a period of two years.

I, Robert Earl Hopper, Jr., the above named Appellant, appeal to The United States Circuit Court of Appeals for the Ninth Circuit from the Judgment above set forth and referred to on the grounds set forth below.

ROBERT EARL HOPPER, JR.
Defendant

CHARLIE W. CLARK
Attorney for Defendant

I.

That the indictment is fatally defective in that it does not state facts sufficient to constitute a crime or *offesne*. [18]

II.

That the statute is unconstitutional and void in that it deprives defendant of his liberty without due

process of law and subjects defendant to involuntary servitude, not as a punishment for crime.

III.

That the statute upon which this action is based is unconstitutional and void in that it delegates legislative authority to private individuals.

IV.

That the court erred in the reception of evidence offered by the United States and erred in the rejection of evidence offered by the defendant whereby defendant was denied a fair trial and was denied substantial justice.

V.

That the court erred in denying defendant's motion for a directed verdict of not guilty made at the close of the case for The United States of America, which said motion was made on the grounds that (a) The Indictment is fatally defective and does not charge a public offense or crime; (b) that the statute in question, Title 50, Sections 301 to 311, is unconstitutional and void in that it violates the First Amendment to the United States Constitution in that it places a penalty upon the free exercise of religion and prohibits the free exercise of religion; (c) that said statute violates the Fifth Amendment to The United States Constitution in that upon its fact and as construed and applied, said statute deprives defendant of liberty and property without due process of law; (d) that said

act on its face and as construed and applied violates the Thirteenth Amendment to the Constitution of the United States in that it subjects Defendant to involuntary servitued not as punishment for crime; (e) that said statute attempts to delegate legislative powers to private, non-governmental agencies and to private individuals; (f) that said statute delegates judicial power to sentence for an unlimited term of [19] involuntary servitude without opportunity to be heard, to a non-judicial tribunal; (g) That no public offense has been proved nor has any crime been proved against this defendant.

VI.

That the court erred in denying defendant's motion for a directed verdict made at the close of defendant's case upon the grounds stated in V hereinbefore.

VII.

That the Honorable Court erred in refusing to instruct the jury as requested by the defendant.

Received copy of Notice of Appeal April 6, 1942.

F. E. FLYNN,

U. S. Atty.

By C. A. EDWARDS,

Asst. U. S. Atty.

[Endorsed]: Filed Apr. 6, 1942. Edward W. Scruggs, Clerk United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [20]

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF
WEDNESDAY, APRIL 8, 1942
(Phoenix Division)

April 1942 Term At Phoenix
Honorable Dave W. Ling, United States District
Judge, Presiding

[Title of Cause.]

Charlie W. Clark, Esquire, appears as counsel for the defendant and now presents defendant's cost and bail bond on appeal in the sum of \$750.00 with the National Automobile Insurance Company as surety thereon, and

It is ordered that said bond be approved and that the defendant be released thereon pending the determination of the appeal herein. [21]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, Robert Earl Hopper, Jr., as principal, and National Automobile Insurance Company as surety, are held firmly and bound unto the United States of America in the full and just sum of Seven Hundred Fifty (\$750.00) Dollars to be paid to the said United States of America, to which payment

well and truly to be made, we bind ourselves, our lawful successors and assigns, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seal and dated this 8th day of April, in the year of our Lord One Thousand Nine Hundred and Forty Two.

Whereas, lately in the October term A. D. 1941 of the District Court of the United States for the District of Arizona in a suit pending in said Court between the United States of America as plaintiff, and Robert Earl Hopper, Jr., as defendant, a judgment and sentence was rendered against the said Robert Earl Hopper, Jr., and the said Robert Earl Hopper Jr., has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and notice of the said appeal, in duplicate, having been filed with the clerk of the District Court of the United States for the District of Arizona [22] and a copy of such appeal having been duly served upon the United States Attorney for the District of Arizona, in the manner and within the time required by law and the rules of Court in such cases made and provided.

Now, the condition of the above obligation is such that if the said Robert Earl Hopper, Jr., shall appear in the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, State of California, on such day or days as may be ap-

pointed for the hearing of said cause in said Court, and upon such day or days may be appointed by said Court until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution or the judgment and sentence of said District Court of the United States for the District of Arizona if said judgment against him shall be affirmed by the said United States Circuit Court of Appeals for the Ninth Circuit, then above obligation shall be void, otherwise to remain in full force and effect.

Now, therefore, and as a further condition of this bond, that if the said Robert Earl Hopper, Jr., appellant above named, shall prosecute his appeal to the effect and shall pay all the taxable costs on appeal if he fails to make his appeal good, then above obligation shall be void, otherwise to remain in full force and effect.

And the surety in this obligation hereby covenants and agrees that in case of a breach of any condition of this bond, the United States District Court for the District of Arizona may upon notice to said surety of not less than ten (10) days proceed summarily in this cause to ascertain the amount of taxable costs in [23] the Circuit Court of Appeals which said surety is bound to pay on account of such breach, and render judgment therefore against said surety and to order execution therefor.

In witness whereof the undersigned have executed this bond this 8th day of April, 1942.

ROBERT EARL HOPPER, JR.

Principal

NATIONAL AUTOMOBILE INSUR-
ANCE COMPANY

By: SAMUEL H. WEISSBERG

Surety.

State of California,
County of Los Angeles—ss.

On this 7th day of April, in the year 1942, before me, David Gunter a Notary Public in and for said County and State, personally appeared Samuel H. Weissberg known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the National Automobile Insurance Company, and acknowledged to me that he subscribed the name of the National Automobile Insurance Company thereto as principal, and his own name as Attorney-in-fact.

(Seal) DAVID GUNTER

Notary Public in and for said County and State.

My Commission Expires March 7, 1945.

Approved this 8th day of April, 1942.

DAVE W. LING

U. S. Dist. Judge.

[Endorsed]: B. R. Filed Apr. 8, 1942. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gwen J. Ballard, Deputy Clerk. [24]

In the United States District Court for the District
of Arizona

MINUTE ENTRY OF
FRIDAY, APRIL 10, 1942

(Phoenix Division)

April 1942 Term At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

It is ordered that counsel for the Government
and counsel for the defendant appear before the
Court on April 11, 1942, at ten o'clock a. m., for
such directions as may be appropriate with respect
to preparation of record on appeal herein. [25]

In the United States District Court for the District
of Arizona

MINUTE ENTRY OF
SATURDAY, APRIL 11, 1942

(Phoenix Division)

April 1942 Term At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

George E. Wood, Esquire, Assistant United
States Attorney, appears for the Government,

Charlie W. Clark, Esquire, appears as counsel for the defendant.

It is ordered that the Court Reporter in this case make available the transcript of testimony on or before April 25, 1942. [26]

In the United States District Court for the District
of Arizona

MINUTE ENTRY OF
TUESDAY, MAY 5, 1942

(Phoenix Division)

April 1942 Term At Phoenix

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

On motion of Charlie Clark, Esquire, counsel for defendant,

It is ordered that the defendant's time within which to file Bill of Exceptions and Assignments of Error herein be and it is extended for a period of ten days. [27]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the defendant above named, by his attorney, Charlie W. Clark, and says that subse-

quent to the institution of the above entitled cause and during the trial thereof on the 27th and 28th days of March, 1942, the court committed manifest error in the admission of evidence and in the rulings upon motions of the defendant, and for his assignments of error specifies the following:

I.

That on the 7th day of February, 1942, the defendant moved to quash the indictment upon the grounds and for the reasons that said information does not state facts sufficient to constitute a crime or offense and that the statute is unconstitutional and void in that it attempts to deprive defendant of his liberty without due process of law and attempts to subject defendant to involuntary servitude and attempts to delegate legislative authority to an executive officer, and that the Honorable Court erred in denying said motion to quash indictment, which order was rendered on the 17th day of February, 1942.

II.

That the Honorable Court erred in overruling defendant's objection to Government's Exhibit No. 1 in Evidence, to which defendant excepted; said Government's Exhibit No. 1 in Evidence being a registration card alleged to have been signed by defendant and which the witness Gerald T. Bigaouette testified that he was from October 17, 1940 until December 31, 1940, the chief clerk of the Local Selective Service Board and that said [28] Exhibit

1 was a part of his records kept under the rules and regulations of the department, the basis of defendant's objection being that Government's Exhibit No. 1 was not properly identified, all as more fully appears on pages 11 and 12 of the Reporter's Transcript.

III.

That the Honorable court erred in overruling defendant's objection to Government's Exhibit 2 in Evidence, to which exception was taken, which Government's Exhibit 2 in evidence is the classification record of the United States Government kept on each individual that is registered in the county or local board, which objection was made upon the grounds that said exhibit was in no way connected with defendant, that there is no foundation laid connecting it with the defendant and that it has never been shown that the defendant has ever registered, as appears at pages 16 and 17, Reporter's Transcript.

IV.

That the Honorable Court erred in overruling defendant's objection to Government's Exhibit 4 in Evidence, which objection was made upon the grounds that said Exhibit 4 was not properly identified and that it was in no way connected with this defendant, said Exhibit 4 being Conscientious Objector's Report, to which ruling the defendant excepted, as appears at page 25, Reporter's Transcript.

V.

The Honorable Court erred in overruling defendant's objection to Government's Exhibit 5 in Evidence, which is a report of physical examination, which objection was made upon the grounds that said Exhibit was in no way connected with the defendant, to which ruling exception was taken by defendant, as appears at pages 28 and 29, Reporter's Transcript.

VI.

That the Honorable Court erred in overruling defendant's objection to Government's Exhibit 6 in Evidence, which said exhibit is a notice of classification, said objection being made upon the grounds that it is in [29] no way connected with this defendant and no foundation has been laid and exception duly taken to the ruling of the court, as appears at page 30, Reporter's Transcript.

VII.

That the Honorable Court erred in overruling defendant's objection to the admission of Government's Exhibit No. 7 in Evidence, which objection was made upon the grounds that it was not identified and had no bearing upon this defendant; said Government's Exhibit No. 7 being Special Form for Conscientious Objectors, and the defendant having excepted to the ruling of the court admitting said exhibit, as appears at pages 33 and 34, Reporter's Transcript.

VIII.

That the Honorable Court erred in overruling defendant's objection to the admission of Government's Exhibit No. 8 in evidence, being a letter as more fully appears in the Bill of Exceptions, addressed to the defendant, which objection was made upon the grounds that said letter was not shown to have any connection with this defendant and was not properly identified, to which ruling the defendant excepted, as appears at page 36, Reporter's Transcript.

IX.

That the Honorable Court erred in overruling defendant's objection to the admission of Government's Exhibit No. 9 in evidence, being letter dated December 23, 1940, addressed to the defendant, which objection was made upon the grounds and for the reason that said exhibit has no bearing on this defendant and is not properly identified, to which ruling defendant excepted, as appears at page 28, Reporter's Transcript.

X.

That the Honorable Court erred in overruling defendant's objection to the receipt in evidence of Government's Exhibit No. 3 for identification, being Government's Exhibit 3 in evidence, which purports to be a selective service questionnaire signed by defendant, which was admitted upon the [30] testimony of Harry F. Dise, who testified that he had been the clerk of the Yavapai County local board, Selective Service system, from January 1,

1941 to the present date, and that he took over the records on January 1, 1941, that had formerly been in the custody of the witness Gerald T. Bigaouette, and that said exhibit was in the file when said witness took over and that said exhibit was a part of the permanent records kept by his office, said Exhibit being objected to by the defendant upon the grounds that it was not shown that the instrument was signed by the defendant and that it was not connected up with the defendant in this case, and that it was incompetent, to which ruling defendant excepted, as appears at pages 47 and 48, Reporter's Transcript.

XI.

That the Honorable Court erred in receiving in evidence Government's Exhibit 2-B in Evidence, which Exhibit 2-B is the remainder of the Classification Record of the United States kept for each individual that is registered in the county of the local board, which objection was made upon the grounds that it was in no way connected with the defendant and that it was incompetent, to which ruling defendant excepted, as appears at page 51, Reporter's Transcript.

XII.

That the Honorable Court erred in denying defendant's motion for directed verdict of not guilty, which said motion was made on the 27th day of March, 1942, after the plaintiff had rested and which said motion was made upon the grounds: That the indictment is totally defective and does

not charge a public offense or crime; that the statute, Sections 301 to 311, inclusive, of Title 50, United States Code, is unconstitutional and void in that it violates the First Amendment of the Constitution of the United States in that it places a penalty on religion and prohibits the free exercise of religion, in that said statute violates the Fifth Amendment to the United States Constitution in that upon its face and as construed and applied said statute deprives defendant of his liberty and [31] property without due process of law and that said act on its face and as construed and applied violates the Thirteenth Amendment to the Constitution of the United States in that it subjects defendant to involuntary servitude not as punishment for crime and upon the further ground that said statute attempts unlawfully to delegate legislative power to private non-governmental agencies, or to private individuals, and upon the further ground that said statute delegates judicial power to sentence for an unlimited term of involuntary servitude without opportunity to be heard, to a non-judicial tribunal, and upon the further ground that no public offense has been proved nor has any crime been proved against this defendant, to which ruling the defendant duly excepted, as appears at pages 82 to 86, inclusive, Reporter's Transcript.

CHARLIE W. CLARK

Attorney for Defendant.
1930 West Adams Street,
Phoenix, Arizona.

Service of copy acknowledged this 14 day of May, 1942.

FRANK E. FLYNN

United States Attorney.

[Endorsed]: Filed May 15, 1942. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. [32]

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF
FRIDAY, MAY 15, 1942

(Phoenix Division)

April 1942 Term

At Phoenix

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

Charlie W. Clark, Esquire, appears as counsel for the defendant, Robert Earl Hopper, and now presents for settlement defendant's Proposed Bill of Exceptions, approved by the United States Attorney, and

It Is Ordered that said Proposed Bill of Exceptions be settled, allowed, and approved as the Bill of Exceptions and made a part of the record herein.

[33]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS.

Be It Remembered that in the District Court of the United States, for the District of Arizona, the Honorable Dave W. Ling, Judge of said Court presiding, and Frank E. Flynn appearing as attorney for the plaintiff and Charlie W. Clark appearing as attorney for the defendant, the following proceedings were had:

That on the 7th day of February, 1942, the defendant filed the following Motion to Quash Indictment:

“(Title of Court and Cause)

MOTION TO QUASH INDICTMENT.

“Now Comes the Defendant above named by his Attorney, Charlie W. Clark, and moves to quash the Indictment in the above entitled cause on the grounds and for the reasons:

I.

That the indictment does not state facts sufficient to constitute a crime or offense.

II.

That the Statute is Unconstitutional and void and attempts to deprive defendant of his liberty without due process of law and attempts to subject defendant to involuntary servitude;

III.

That the Statute is Unconstitutional and void in that it unlawfully attempts to delegate legislative authority to an executive officer.

CHARLIE W. CLARK

Attorney for Defendant.

Phoenix, Arizona,

February 7, 1942.

CHARLIE W. CLARK,

Attorney for Defendant,

1930 West Adams St.,

Phone 4-3744. [34]

Service of the above motion acknowledged this 7th day of February, 1942.

FRANK E. FLYNN

United States Attorney

By.....

.....

STATEMENT OF POINTS AND AUTHORITIES RELIED ON IN SUPPORT OF MOTION TO QUASH.

I.

The Indictment does not allege by whom defendant was notified to report, whether he was notified before or after his arrest in the instant case, and does not allege where defendant was ordered to report. Defendant is evidently charged with an act of omission and yet the thing he omitted to do is not alleged.

Every fact necessary to constitute the crime charged must be directly and positively alleged and nothing can be charged by implication or intendment.

U. S. v. Britton, 107 U. S. 655.

U. S. v. Cruikshank, 92 U. S. 542.

Omission from an Indictment of any fact or circumstance necessary to constitute an offense will be fatal.

Harris v. U. S., 104 Fed (2) 41.

The Indictment is so indefinite and uncertain that defendant cannot properly raise the Constitutionality of the Statute and is so indefinite and uncertain as not to provide a reasonable standard of guilt or innocence.

II.

Defendant relies on the Fifth and Thirteenth Amendments to The Constitution of the United States.

CHARLIE W. CLARK

Attorney for Defendant.”

That on the 9th day of February, 1942, said motion came on to be heard and on the 17th day of February, 1942, the Honorable Court entered its order denying said motion to quash the indictment.

[35]

That on the 27th day of March, 1942, upon the trial of said cause

GERALD T. BIGAOUETTE

was called as a witness on behalf of the plaintiff and testified as follows:

“Q. At any time did you have any official connection with the Selective Service Board?

A. Yes, sir.

Q. And in what capacity?

A. I was employed as chief clerk?

Q. And over what period?

A. From October 17th until January—the last year of my service there was December 31, 1940.”

And

“Mr. Flynn: I show you Government’s Exhibit 1, Mr. Bigaouette, and ask you if that was one of the records kept in the Selective Service Board Office at Prescott while you were in charge there?

A. Yes, sir.

Q. And the date, does it indicate the date on which that was made a part of the records?

A. Yes, sir.

Q. What is the date?

A. October 17th, 1940.

A. And is that a part of the records in connection with the record kept in the office covering the defendant’s transactions with the Board here and his registration, and so forth?

(Testimony of Gerald T. Bigaouette.)

A. Yes, sir; it is.

Q. And one of the records of which you are required to keep under the rules and regulations of the department?

A. Every registrant has one.

Mr. Flynn: We offer this in evidence.

Mr. Clark: I object to it, it is not properly identified.

The Court: It may be received.

(The document was received as Government's Exhibit 1 in evidence.)

Mr. Clark: It has no bearing on this defendant.

Mr. Flynn: I will read to you Government's Exhibit 1 in evidence. [36]

Mr. Clark: If it please the court, may we have an exception to the court's last ruling? Pardon me, Mr. Flynn.

The Court: Yes."

Thereupon, on said 27th day of March, 1942, the plaintiff proposed and offered in evidence the following paper:

(Testimony of Gerald T. Bigaouette.)

GOVERNMENT'S EXHIBIT 1.

“Serial Number Name: Robert Earl Hopper Jr.
2041

Order Number
217

Address: Camp Verde, Yavapai, Arizona
Telephone: Camp Verde #1—Haydons
Age: 22. Place of Birth: Garden Grove, California, U. S. A.

Date of birth: October 8, 1918.

Name of person knowing address: Mrs. Fern Hopper, Mother.

Address: Camp Verde, Yavapai, Arizona.

Employer's name: Robert Earl Hopper.

Place of employment or business: Camp Verde, Yavapai, Arizona.

I Affirm That I have verified above answers and that they are true.

BOB HOPPER.”

(Back Side of Card)

“Description of Registrant

Race, white. Height 5 ft. 10 in. Weight 190.
Complexion, light.

Color of eyes, blue. Color of Hair, brown.

Other obvious physical characteristics that will aid in identification:

Upper Forehead—hairline scar.

Signed by registrar Laura H. Wall

(Testimony of Gerald T. Bigaouette.)

Register for Camp Verde, Yavapai, Arizona

Date of registration: October 16, 1940

Yavapai County Local Board

October 17, 1940

P. O. Bldg. Prescott, Arizona."

And the said Gerald T. Bigaouette further testified for the plaintiff as follows:

"Mr. Flynn: I show you now, Mr. Bigaouette, Government's Exhibit No. 2 for Identification, consisting of two sheets, and ask you if those two sheets, from the records of the local Selective Service Board of Prescott, were kept while you were in charge of the office? I don't mean by that that all of the entries on them were made by you but were those records from the records of that——

A. (Interrupting) Yes, they were. This is all my handwriting." [37]

Thereupon the following paper was offered and proposed in evidence by the plaintiff:

(Testimony of Gerald T. Bigaouette.)

GOVERNMENT'S EXHIBIT 2
in Evidence

1 Order No. Par. 317	2 Name of Registrant Par. 317	3 Serial No.	4 Age	5 Race
217s	Robert Earl Hopper, Jr.	2041	22	wh
6 Date of volunteering for Induction	7 Date of Record Transferred by or to Local Board Pars. 383 and 425	8 Date Registrant's Record Returned Pars. 383, 384, 425		
XXX	XXX	XXX		
9 Date Questionnaire Mailed Par. 319	10 Return of Questionnaire extended to Par. 320	11 Date Questionnaire Returned		
11-19-40	XXX	11-27-40		
12 Date Claim for Deferment Filed by Another	13 Classification Par. 332 IV	14 Par. 336 Date Notice to appear for Physical Exam. Mailed		
XXX	E	11-28-40		
15 Date Registrant Appeared for Exam. Par. 336	16 Date Classification by Local Board Mailed to the Registrant	17 Date Request to Appear Before Local Board Received Par. 368		
12-2-40	1-3-41 12-12-40	XXX		
18 Time fixed for Registrant to appear before Board	19 Enter if Appeared	20 Date of Appeal to Board of Appeal Par. 373		
XXX	XXX			
21 Date of Forwarding Registrant's Record to Board of Appeal	22 Date Notice of Board of Appeal's Decision mailed by Local Board Par. 377			
XXX	XXX			

(Testimony of Gerald T. Bigaouette.)

II

CLASSIFICATION RECORD CONT'D

Local Board for Yavapai County, Ariz.

23 Date Notice of Continuance of Classification Mailed	24 Date of Order to Report for Induction	25 Time Fixed for Registrant to report for Transportation to Induction Station
XXX	XXX	XXX
26 Final Disposition at Induction Station	27 Remarks Including Information of Appeals to President, Par. 380, also Pars. 344, 389, & 391	28 Order Number Par. 317
XXX	Request for D.S.S. Form 47 Requested after Classifica- tion—12/19/40 Mailed 12/23/40	Rec'd 1-3-41 217

And the said Gerald T. Bigaouette further testified:

“Q. Generally, what is this record?

A. It is a classification record of the United States Government regulations to keep on each individual that is registered in the County or in the local Board.

Q. I will ask you if, in this record, which is Government's Exhibit No. 2, is a record covering the transactions of the defendant here, Robert Earl Hopper, Jr.?

A. Yes, sir; there is.

Q. I will ask you to examine the records affecting the first registration there and see if you made all of those entries there, and what, if you made any entries in that?

(Testimony of Gerald T. Bigaouette.)

A. I made every notation on here except one, two, three, four, five.

Q. And were those entries made approximately at the time of the transactions which they purport to record?

A. Yes, they had to be made. They had to be kept to date.

Q. And they correctly reflect those transactions that you made there? A. Yes, sir.

Q. Now, calling your attention to this line which is marked here "217-S", and that runs across both sheets, is that correct? [39]

A. That is correct, sir.

Q. And on that line are recorded all of the entries affecting the defendant?

A. On the sheets, yes.

Q. I mean, the other entries and the other lines have nothing to do with this defendant?

A. Nothing at all.

Q. Now, where are the entries; will you indicate the entries there that you didn't make?

A. Well, I didn't put this pencil "S" in there. I don't know who put that in. I didn't make this classification here. I don't know, this "E" (indicating on document).

Q. Classification?

A. That is under "4", Classification "4", and there is an "E" entered there.

Q. That is under Column No. 13, is that correct? A. That is correct, sir.

(Testimony of Gerald T. Bigaouette.)

Q. And how about the entry under Column 14? A. That is my entry——

Mr. Clark: (Interrupting) If the court please, I want to enter a general objection to testifying, because it is not in evidence.

Mr. Flynn: I am trying to exclude the part he didnt make, that is all. I am not testifying to what is in here.

The Witness: I also didn't make this entry (indicating on document).

Q. You didn't?

A. No, sir; or the entry under the Column 16 and there is an entry under Column 28 here that I didn't make. However, I made one of them.

Q. You made the one in the black ink?

A. In the black ink.

Q. And the one in red under 27 and 28, you didn't make?

A. No. Under 27, that is my handwriting, but under 28, I didn't.

Q. The red ink entry under Column 28, you didn't make? A. I didn't make. [40]

Mr. Flynn: In order to avoid recalling the witness back and forth on the stand, I would like at this time to offer in evidence this line, which is Government's Exhibit 2 for Identification, this number 217, with the exception of the entry—what was that first column?

A. There is a pencil notation made that I didn't——

(Testimony of Gerald T. Bigaouette.)

Mr. Flynn: (Interrupting) Except the "S" bearing the numbers 217 and the entries in Column——

A. (Interrupting) 16.

Q. Above the——

A. Above the figures 1-3-41, I didn't put in there.

Q. And also the red ink entry under Column 28? A. That is correct.

Mr. Flynn: With the exception of those, which we will offer when we have identified them, but we will offer in evidence this, your Honor, for the purpose of examining the witness as to the entries and the papers referred to.

Mr. Clark: Well, we will object to the offer of this exhibit in evidence on the grounds that it is in no way connected with the defendant, no way shown——

The Court: You haven't seen it yet, have you?

Mr. Clark: It hasn't been connected with the defendant.

The Court: You don't know whether it is or not; you haven't looked at it.

Mr. Clark: Upon the ground there is no foundation laid connecting it with this defendant. There is no showing that this defendant has registered; no showing it is in any way connected with him, and I may have a further objection.

(Testimony of Gerald T. Bigaouette.)

The Court: Well, if that is your only objection, it will be overruled.

Mr. Clark: Why, I haven't seen it yet, so I may have a further objection.

The Court: You had better show it to counsel.

Mr. Flynn: Now, Mr. Bigaouette, this first column, Column No. 1, what does the—what do the figures 217 refer to there?

A. That is—

Mr. Clark: (Interrupting) If the court please, I object to them testifying from a matter not in evidence.

Mr. Flynn: This was just admitted. [41]

The Court: You haven't shown it to counsel yet. He is supposed to have a look at it.

Mr. Flynn: He didn't ask for it.

The Court: Well, show it to him.

(Thereupon the document was handed to Mr. Clark.)

Mr. Clark: We have no further objections other than previously stated.

The Court: All right, it may be received.

Mr. Clark: May we have an exception?"

And the said Gerald T. Bigaouette further testified:

"Mr. Flynn: (Handing document to witness.) Who mailed that?

A. Who mailed that?

Q. Yes.

A. I did, sir. It was mailed jointly by the

(Testimony of Gerald T. Bigaouette.)

Do not write below this line. National Headquarters will complete this information.

Assigned to..... (Date)

Reported to

Transferred to

Discharged from

Service satisfactorily completed on.....
and

D.S.S. Form 48

16-20057

Instructions

1. The Local Board will make four copies of this form for each registrant when the registrant has been placed in Class IV-E. Under "Remarks" the board will indicate any information that will assist National Headquarters to properly assign the registrant to work of national importance under civilian direction.

2. All four copies of this form will be held by the board until the registrant's order number is reached and then they will be dated, signed by a member of the board; three copies shall be mailed to the State Director, and the fourth copy placed in the cover sheet of the registrant.

3. The State Director will forward two copies to National [43] Headquarters and retain one copy for State Headquarters file.

(Testimony of Gerald T. Bigaouette.)

4. Upon receipt of this form, National Headquarters will decide where the registrant will be assigned to work of national importance and will issue the necessary instructions to the State Director on D. S. S. Form 49 Assignment to Work of National Importance. The State Director will mail the Local Board a copy of the assignment, giving location of the camp where assigned, name of the person to whom registrant must report, and the date when to report.

At least 5 days prior to the time when the registrant must report for assignment to the camp, the Local Board must notify the registrant by mailing him the Order to Report for Work of National Importance (D. S. S. Form 50)

U. S. Government Printing Office
16—20057.”

And in identification of said paper the said witness, **Gerald T. Bigaouette** testified as follows:

“Q. Referring to this Government’s Exhibit 4 for Identification and to Column 14 in Government’s Exhibit 2A in evidence, I will ask you if such a notice properly filled out was mailed to this defendant? A. Yes, sir.

Q. And in a franked envelope addressed to Camp Verde, Arizona, is that right?

A. No, sir.

(Testimony of Gerald T. Bigaouette.)

Q. How was it mailed?

A. It is mailed—those forms——

Q. (Interrupting) These are post-cards themselves? A. That is right, sir.

Q. The address is placed on the card?

A. That is correct.

Q. And that was done by you and under your supervision? A. Yes, sir——

Mr. Clark: (Interrupting) We object to that as leading and suggestive, your Honor.

Mr. Flynn: Now, we offer it in evidence.

Mr. Clark: I make the same objection that I made prior.

The Court: It may be received.

(The document was received as Government's Exhibit 4 in evidence)

Mr. Clark: May we have an exception?"

[44]

Thereupon, on said 27th day of March, 1942, the witness Gerald T. Bigaouette further testified:

“Mr. Flynn: Now, I show you Government's Exhibit 5 for Identification and I will ask you if that is a part of the records which were kept in the office at Prescott there, the Selective Service office while you were in charge?

A. That is correct, sir.

Q. And what is the source of that record; where did it come from, if you know?

A. It comes from—we sent it at the time of

(Testimony of Gerald T. Bigaouette.)

that card which was just offered as an exhibit.

Q. That is, Exhibit 4?

A. Was sent to the registrant. We, in turn, send one of these to the examining physician that had it filled out, the man's name and address, initial, and it is accompanied by a letter. It was at that time,—I don't know now whether it is or not, telling the doctor at what time he would report.

Q. All right, go ahead.

A. And the doctor, in turn, fills it out and it is returned to the office for—and is kept with the records and the Board so acts upon this report that is wrote up by the examining physician.

Q. It is kept as a part of the files of the office there?

A. That is correct.

Q. And is the basis, then, for action of the Board?

A. That determines whether or not he can be for classification, whether he is physically unfit, which comes under a different classification.

Q. Referring to the signature of Alfred B. Carr, is that the signature of Alfred B. Carr who was chairman of the Board at that time?

A. Yes, sir.

Q. And that is placed in there after the report of the physical examination is returned to the office?

A. To the office by the doctor.

(Testimony of Gerald T. Bigaouette.)

Q. Are there any other entries on this exhibit except what was there when it was returned to your office?

A. Yes, there is this writing on here and this stamp right here (indicating on Exhibit 5).

Mr. Flynn: That is the stamp the clerk just put on here and is a part of this record, identifying it as Exhibit 5?

A. Yes, sir. [45]

Q. This "Exhibit No. 2" here in pen (indicating on exhibit)?

A. I don't know anything about it.

Q. That wasn't on it when it was returned to you? A. Not that I remember, sir.

Q. Anything in the body of the instrument, changes or any additions made to it?

A. Not—I—none that I can swear about. It looks the same as it did when it came back."

And thereupon, the plaintiff offered in evidence the following paper:

"GOVERNMENT'S EXHIBIT 5
in Evidence

Report of Physical Examination

Hopper, Jr. Robert Earl. Order #217. Race: white.

Occupation: Farm laborer and cattle raiser.

Address: Camp Verde, Yavapai, Arizona.

Mother tongue: English.

(Testimony of Gerald T. Bigaouette.)

Birthplace: Garden Grove, California.

Date of birth: October 8, 1918.

Statement of Person Examined

Do you consider that you are now sound and well? Yes.

What illnesses, diseases, or accidents have you had since childhood? None.

Have you ever had any of the following? If so, give dates: all answers—No.

When were you last treated by a physician, and for what ailment? Tonsillectomy 10 years ago.

Have you ever been under treatment at a hospital or asylum? No.

I further certify—

Place: Cottonwood, Ariz.

Date: 12-2-40.

ROBERT EARL HOPPER, JR.

Alfred B. Carr

January 3, 1941

Physical Examination by Physician

1. Eye abnormalities—none.
2. Ear, nose, throat abnormalities—none.
3. Mouth and gum abnormalities—none.
4. Teeth.
5. Skin—normal.
6. Varicose veins—none.
7. Hernia—none.
8. Hemorrhoids—no.

(Testimony of Gerald T. Bigaouette.)

9. Genitalia—normal.
10. Feet—good.
11. Musculo defects—none.
12. Abdominal viscera—normal.
13. Cardiovascular system—good.
14. Lungs—normal.
15. Nervous system—normal.
patellar—normal.
16. Endocrine disturbances—No.
17. Blood test syphilis—negative.

(Kline, Hinton & Kahn—12/5/40) [46]

I certify that I have carefully examined and reviewed the record of the examination of the person named herein and that it is my judgment and belief that he is: **Class I A.**

Place: Cottonwood, Ariz.

Date: 12/2/40

J. T. TAYLOR

Examining Physician

I hereby appeal from the finding of the above Local Board to the Board of Appeal because of: Conscientious objections.

ROBERT EARL HOPPER JR.

Registrant.

Date: Dec. 16, 1940.

* * * * *

Vision:

Right eye 20/20

Left eye 20/20

Hearing:

Right ear 20/20

Left ear 20/20

Height 69½ in.

Weight 189½ lb.

(Testimony of Gerald T. Bigaouette.)

Girth (at nipples): Posture Good

Inspiration 42 in.

Expiration 36 in.

....Girth (at umbilicus) 35 in. Frame good

Pulse: Color of hair light brown

Sitting 74 Color of eyes blue

After exercise 88 Complexion ruddy

2 min. after exercise 77 Blood Pressure:

Urinalysis: Systolic 130

sp. gr. 1.020 Diastolic 75

Albumin negative

Sugar negative

Microscopic not made

* * * * *

1. Order No. 217. Local Board Yavapai.
State Arizona.

2. Date specimen.

3. Hopper Robert Earl
(Last name) (First Name) (Middle name)

4. Camp Verde Yavapai Arizona
(town or city) (County) (State)

5. Birth date October 8th. 1918. Race White.

6. Suspicious open lesions: Primary——
Secondary.....

7. CC discharge: Yes..... No. X. Smear:
Pos..... Neg..... Taken but not yet ex-
amined..... Not done.....

8. Qualified for military service:

General Limited Disqualified

X.

JOHN T. TAYLOR, M. D.

JOHN T. TAYLOR,

Examining Physician.

(Testimony of Gerald T. Bigaouette.)

Laboratory Report of Serologic Blood Test

9. Lab. Specimen No. 31868 Neg. Pos. Doubt.

X

10. Name of test Kline, Hinton & Kahn.

11. State Board of Health Lab.

FRED J. BAKER,

Laboratory Director.

Flagstaff, Arizona

(To Selective Service Board)

Date of Report 12/5/40

16—18064." [47]

Instructions

1. This form is filled out in duplicate, with black ink or typewriter. All entries must be placed on both copies. Only originals are signed. If a registrant is transferred to another board for physical examination, that board makes out this report in triplicate.

2. Recommendations and findings as to qualification or disqualification for service are indicated by the completion of the appropriate finding, if such completion be required, and by lining out those not appropriate.

3. Any answer in the registrant's statement indicating a possible disqualification will be followed up by searching inquiry and examination and the result noted in the examination physician's report.

4. All deviations from normal will be noted under the proper heading.

(Testimony of Gerald T. Bigaouette.)

5. The space under the heading "Remarks" will be used for continuation of an answer if the allotted space is insufficient, and for any further statements that the examining physician may desire to make.

6. After the examining physician has made his entries on both copies, the duplicate copy is kept in the registrant's cover sheet until appeal based on this report is waived or is acted on by the Board of Appeal. The duplicate is then sent to the Governor (State Headquarters for Selective Service) for forwarding to the Director of Selective Service.

7. If the registrant is examined by the Medical Advisory Board, only the original is sent to that board.

8. When the registrant reports to an induction station he takes the original with him.

Note:—Use this form not only for registrants examined but also for physically disqualified registrants placed in Class IV without physical examination.

D.S.S. Form 200—Report of Physical Examination."

And the following proceedings were had thereon:

"The Court: It may be received."

And

"Mr. Clark: May it please the court, has Exhibit 5 been ruled upon?"

(Testimony of Gerald T. Bigaouette.)

The Court: Yes.

Mr. Clark: May we have an exception?

The Court: Yes."

Thereupon, the Government offered in evidence the following paper: [48]

GOVERNMENT'S EXHIBIT 6

In Evidence

Selective Service

Official Business

Penalty for Private Use to Avoid

Payment of Postage, \$300.

.....
(Stamp of Local Board)
.....

NOTICE OF CLASSIFICATION

Note: Appeal from a classification by a Local Board or Board of Appeal must be made within five days from the date of this notice at the office of the Local Board.

The person named herein whose Order	Be Alert
No. is	
(Local Board	Keep in touch with your Local Board. Notify it of any change of address.
Has been classified by (.....	
(Board of Appeals.....	
in Class.....until.....	Notify it of any fact which might change your classification.
(Date)	
..... Member of Local Board	

(Testimony of Gerald T. Bigaouette.)

Notify your employer
of this classification

.....
(Date)

Failure to notify the Board of these facts within five days of the happening thereof is an act punishable by fine and imprisonment."

D.S.S. Form 57

And the said witness Gerald T. Bagouette testified thereto as follows:

"Mr. Flynn: Showing you Government's Exhibit 6 for Identification, I will ask you if that is the form card that was mailed to the defendant on the 12th of December, 1940?

A. That is correct.

Q. And that was filled out, blanks were filled out showing his classification and the address placed on it and placed in the mail under your direction?

A. That is right, and bears the stamp of the local Board on it.

Mr. Flynn: We offer this Government's Exhibit 6 in evidence, for the purpose of showing to the jury the form used.

Mr. Clark: Well, we object to it on the same grounds, that it is in no way connected with this defendant. [49]

The Court: It may be received.

(The document was received as Government's Exhibit 6 in evidence).

Mr. Clark: May we have an exception?"

(Testimony of Gerald T. Bigaouette.)

Thereupon, the plaintiff offered in evidence the following paper:

GOVERNMENT'S EXHIBIT 7

For Identification

"Please send me blanks for Conscientious Objectors.

BOB HOPPER

Camp Verde, Arizona."

And said witness Gerald T. Bigaouette testified thereto as follows:

"Mr. Flynn: I show you Government's Exhibit 7 for Identification and ask you if you recognize it, having seen it before?

A. Yes, sir; I have.

Q. Where did you first see it?

A. Inclosed with some correspondence, and I don't remember just which it was.

Q. Did it come into the office there and is a part of the records of the office?

A. That is correct, sir.

Mr. Flynn: We offer it in evidence.

Mr. Clark: We object to it until it is identified, to be shown to have some bearing upon this defendant.

The Court: It may be received.

(The document was received as Government's Exhibit No. 7 in evidence.)

Mr. Clark: May we have an exception?"

(Testimony of Gerald T. Bigaouette.)

(Thereupon Government's Exhibit No. 7 in evidence was read to the jury by Mr. Flynn.)

(Thereupon, the plaintiff offered the following paper in evidence:

Special Form for Conscientious Objector

Name Robert Earl Hopper, Jr.

(First) (Middle) (Last)

Address

Camp Verde Yavapai Arizona

(City, town, village) (County) (State)

Order No. 217

Yavapai County Local Board

December 23, 1940

P. O. Bldg Prescott, Arizona

This form must be returned on or before December 28, 1940 (Five days after date of mailing or issue) [50]

Instructions

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Questionnaire.

The questions in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be

(Testimony of Gerald T. Bigaouette.)

for the information only of the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be conscientious objector, the Local Board shall proceed in the ordinary course to classify him upon all other grounds of deferment, and shall consider and pass upon his claim as a conscientious objector only if, but for such claim, he would have been placed in Class I. The procedure for appeal from a decision of the Local Board on a claim for conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector: Provided, however, That the Local Board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—Claim for Exemption

Instructions.—The registrant must sign his name to either Statement A or Statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(Testimony of Gerald T. Bigaouette.)

A. I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed by reason of my religious training and belief to participation in war in any form and to participation in combatant military service or training therefor; but I am willing to participate in noncombatant service or training therefor under the direction of military authorities.

.....
(Signature of registrant)

B. I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed by reason of my religious training and belief to participation in war in any form and to participate in any service which is under the direction of military authorities.

ROBERT EARL HOPPER JR.

(Signature of Registrant)

Series II.—Religious Training and Beliefs

Instructions.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Describe the nature of your belief which is the basis of your claim in Series I above.

(Testimony of Gerald T. Bigaouette.)

As a Christian I believe in following the teachings of Jesus Christ. Jehovah's witnesses are entirely neutral to the affairs of the world. The Bible tells us that every one of the witnesses from Abel down to the present time have been entirely neutral to the controversies between the nations, because all nations are against God and his kingdom. [51]

2. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim made in Series I above.

For the past year the Watchtower Society had maintained a school or company at Cottonwood, and Clarksdale, for the purpose of aiding students of the Bible. This Bible society gives instructions to students by correspondence for a careful study of the scriptures. I have received instructions from ministers, servants, and elders regularly each week in the study of the bible.

D.S.S. Form 47

16-18144

3. Give the name and present address of the individual upon whom you rely most for religious guidance.

I do not rely upon any individual for any guidance. I look to the Bible as my instructor and to God and to Christ Jesus.

4. Under what circumstances, if any, do you believe in the use of force?

(Testimony of Gerald T. Bigaouette.)

If a thief breaks into my house God's law allows me to engage in self defense, also if attack on the street or elsewhere. I am not a Pacifist.

5. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

I don't take part in any affairs of the world. I do not vote.

6. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made in Series I above? If so, specify when and where.

Yes, orally, I have expressed my views to friends, neighbors and to strangers, about God's kingdom to be set up on the earth. In the community where I live.

Series III.—General Background

Instructions.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Give the name and address of each school and college which you have attended, together with the dates of your attendance; and state in each instance the type of school (public, private, church, military, commercial, etc.

(Testimony of Gerald T. Bigaouette.)

Name of School	Type of School	Location of School	Dates Attended	
			From	to
Camp Verde High	Public	Camp Verdd	1933	1937
University of Arizona	Public	Tucson	1937	1938

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below with regard to each position or job held, or type of work in which engaged:

Type of Work	Name of Employer	Address of Employer	Period Worked	
			From	to
Cattle raising & Farming	Earl Hopper	Camp Verde	1940	1941

[52]

Series II.

A.1. We Jehavoh's Witnesses are not pacifists, as Jesus stated "if my kingdom was of this world, then would my servants fight." (John 18:36) Abram with the approval of Jehovahs fought against a nation only when Lot, also a faithful servant of God was assaulted and carried off as a captive. At Hebrews Eleventh Chapter, it says that all faithful followers of Almighty God were entirely neutral to all controversies between nations.

(Testimony of Gerald T. Bigaouette.)

Series IV.

A.2. "Ye are my witnesses saith the Lord and my servant whom I have chosen; that ye may know and believe me, and understand that I am he; before me there was no God formed, neither shall there be after me. I even I am the Lord; and beside me there is no savior. I have declared, and have saved, and I have showed, when there was no strange God among you; therefore ye are my witnesses, saith the Lord, that I am God. (Isaiah 43:10-12)

* * * * *

Yavapai County Local Board

December 31, 1940

P. O. Bldg. Prescott, Arizona

3. Give *an* addresses and dates of residences where you have formerly lived:

Name of City, Town, or Village	State or Foreign Country	Dates of Residence	
		From	to
Camp Verde	Arizona	1918	1941

4. Give the name, and address, and country of birth of your parents and indicate whether they are living or not.

Earl Hopper Fort Stanton N. Mexico U.S.A.
Fern Hopper Jerome Arizona U.S.A. Both living.

(Testimony of Gerald T. Bigaouette.)

Series IV.—Participation in Organizations

Instructions.—Questions 1, 2 and 3 in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Have you ever been a member of any military organizations or establishment. If so, state the name and address of same and give reasons why you became a member.

No.

2. Are you a member of a Christian organization? Yes. If your answer to question 2 is yes, answer questions (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you:

Jehovah's Witnesses, a group of Christians whose headquarters are 117 Adams Street, Brooklyn, New York.

(b) When, where, and how did you become a member of said sect or organization?

In 1939 at Lynwood, California, Having kingdom message presented to me, I became convinced that it was the truth. [53]

(c) State the name and location of the church, congregation, or meeting where you customarily attend:

Watchtower study, Clarksdale, Arizona.

(Testimony of Gerald T. Bigaouette.)

(d) Give the name and present address of the pastor or leader of such church, congregation or meeting:

May Scott, Cottonwood, Arizona.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war:

The true followers of Christ Jesus must be diligent to obey this and Jehovah's commandment. As Christ stated "They are not of the world, even as I am not of the world." (John 17:14, 16. John 15:19) "Neither pray I for these alone, but for them also which shall believe on me through their words." (John 17:20)

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than religious or military:

None.

Series V.—References

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war:

Name	Full Address	Occupation or Position	Relation to you
Homer Paffenbarger	11030 Pine St. Lynwood, Calif.	Carpenter	None
Irvin Scott	Cottonwood, Arizona	Shovel Operator	None
E. F. Bucey	Covington, Tenn. R. 2	Pioneer	None
A. Stimmick	Clarksdale, Arizona	Works in Smelter	None

(Testimony of Gerald T. Bigaouette.)

Registrant's Affidavit

Instructions.—The claim made on this form will not be considered unless it is supported by the following affidavit. (If the registrant cannot read, the questions and his answers thereto shall be read to him by the officer who administers the oath.)

State of Arizona,
County of Yavapai—ss.

I, Robert Earl Hopper, Jr., do solemnly swear (or affirm) that I am the registrant described in the foregoing questions and answers, that I know the contents of my said answers, and that each and every statement of fact in my answers to said questions is true, to the best of my knowledge and belief.

ROBERT EARL HOPPER JR.

(Registrant sign here)

Subscribed and sworn to (or affirmed) before me this 28th day of December, 1940.

JESSIE STEPHENS

(Signature of officer administering oath)

Postmaster

(Designation of officer)

[54]

If the registrant has received assistance from an advisor, the advisor shall sign the following statement:

(Testimony of Gerald T. Bigaouette.)

I have assisted the registrant herein named
in the preparation of this form.

.....
(Signature of advisor)
.....

.....
(Address of advisor)"

and the witness, Gerald T. Bigaouette, testified
thereto as follows:

"Mr. Flynn: I show you Government's Exhibit 8 for Identification, which purports to be Form DSS 47, and ask you if that was a part of the records up there in the office, or if that is the form which you mailed to the defendant?

A. Well, this is the form.

Q. That was mailed in the regular course of business as other letters were mailed there under your direction?

A. That is right.

Q. There to the defendant at Camp Verde, Arizona?

A. I sent this one myself, I know.

Q. Were you in the office when this was returned to the office?

A. Yes, sir."

And

"Mr. Flynn: We offer this in evidence as Government's Exhibit 8 in evidence).

(The document was received as Government's Exhibit 8 in evidence.)"

(Testimony of Gerald T. Bigaouette.)

And

“The Court: It may be received.

Mr. Clark: May we have an exception?

The Court: Yes.”

Thereupon, the plaintiff offered in evidence the following paper:

GOVERNMENT'S EXHIBIT 9
in evidence

“December 23, 1940

Mr. Robert Earl Hopper, Jr.

Camp Verde

Arizona

Dear Sir: [55]

In compliance with your request, included herewith is D.S.S. Form 47, Special Form for Conscientious Objector.

Please complete this form in its entirety, have signature notarized or acknowledged, and return to this office at once.

Yours very truly,

SELECTIVE SERVICE BOARD

By GERALD T. BIGAOUETTE

GTB/dv

Chief Clerk.”

And the witness, Gerald T. Bigaouette, testified thereto as follows:

“ . . . Q. I show you now Government's Exhibit 9 for Identification?

A. Yes, sir.

(Testimony of Gerald T. Bigaouette.)

Q. And is Government's Exhibit 9 for Identification a carbon copy of that letter?

A. Yes, sir.

Q. And you signed the original and enclosed it in the envelope with this form?

A. I did, sir.

Mr. Flynn: We offer Government's Exhibit 9 in evidence.

Mr. Clark: We object to this being received in evidence until it is identified to have some bearing on this defendant.

The Court: It may be received.

(Thereupon the document was marked as Government's Exhibit 9 in evidence.)

Mr. Clark: May we have an exception?

The Court: Yes."

GOVERNMENT'S EXHIBIT No. 14

Proceedings Before the Local Board of
Yavapai County, June 20, 1941

Present: Alfred B. Carr, Chairman, Lauren V. Seares, Joseph W. Berg, Egbert K. Dutcher, Members, and Nellie G. Prince, Stenographer.

Order No. 217

In the Matter of the Application of

ROBERT EARL HOPPER, JR.,
for Classification as a Minister of Religion,
and his Application for Extension of Time
within which to Appeal the Decision of
the Local Board of Yavapai County.

(Testimony of Gerald T. Bigaouette.)

WILLIAM ROBERT DINGMAN,

being first duly sworn, testified as follows:

By Mr. Carr:

Q. Your name is William Robert Dingman?
A. Yes sir.

Q. And your postoffice address is Box 190, Prescott, Arizona?
A. Yes sir.

Q. You live on Vyne and Adams Streets in Forbing Park?
A. That's right.

Q. You were born on May 3, 1919?

A. I was.

Q. And you are registered for Selective Service with Local Board No. 2 Woodburn, Oregon?
A. That's right.

Q. State what your connection is, if any, with the organization known as Jehovah's Witnesses.

A. I am Company Servant, Prescott Company of Jehovah's Witnesses.

Q. Does that give you jurisdiction of Mr. Hopper at Camp Verde within your organization?

A. Jurisdiction? Well, I direct his activities and show him how that is carried on. Give him the latest information from the Watchtower Society, and the latest publications on religious issues, and give him any instructions that come from the Watchtower Society.

Q. Did you in the spring of this year receive any communication from a superior of

(Testimony of Gerald T. Bigaouette.)

yours in the organization in regard to classification of members of your organization as ministers of religion?

A. From the General Counsel of Jehovah's Witnesses, I did.

Q. Who is he? A. H. C. Covington.

Q. And what is his address?

A. I don't know at the present time. I can find out. I haven't it at the present time. I could find out this afternoon.

Q. Where is his headquarters?

A. In New York City, New York.

Q. What was this communication?

A. Advising us of the results of a discussion between the General Counsel of Jehovah's Witnesses and the entire Executive Staff of the Selective Service at Washington, and as a result of that conference it was ruled that Jehovah's Witnesses possessing the credentials of ordination and serving as ministers of religion for Jehovah's Witnesses were entitled to exemption as regular or ordained ministers, or as IV-D.

Q. In connection with the receipt of that information did you give any instructions to Mr. Hopper?

A. Not until he came to me and stated his case before me and asked what his position was. He stated to me it was the will of Almighty God that he preach the gospel, and asked what

(Testimony of Gerald T. Bigaouette.)

steps he should take to continue preaching that message.

Q. When and where was it you had your conversation with Mr. Hopper, to the best of your recollection?

A. I would say about four weeks ago, first. That was after I was first appointed Company Servant of Jehovah's Witnesses.

Q. And that would be about the middle of May?

A. I would say about the last of May.

Q. Where was that conversation?

A. At Camp Verde.

Q. And did you at that time instruct him to change his statement in his questionnaire in order to secure the classification of IV-D?

A. I didn't instruct him, no.

Q. What did you tell him?

A. I told him if he chose to be recognized as IV-D—I informed him of what the General Counsel had informed me in regard to all of Jehovah's Witnesses. Whether he wanted to do that or go to the army was entirely up to him.

Q. Now, at the time of your conversation with him did he state to you what his classification was?

A. He said that it was I-A. He said he registered in his original papers as a conscientious objector and had never received his con-

(Testimony of Gerald T. Bigaouette.)

scientious objector blanks; that as soon as he received his I-A classification he came here and after a discussion with the Board got these papers, and since that time he hadn't heard a thing.

Q. This was in the latter part of May or the first of June, 1941? A. That's right.

Q. The records of this office show his Special Form for Conscientious Objector, DSS Form 47, was executed by him on December 28, 1940 and filed in this office on December 31, 1940. He stated at that time that he had not received the papers in which he claimed to be a conscientious objector?

A. Oh, no. He stated he hadn't received any further classification. He stated to me that he had gotten these papers after his conversation here, after he came after the papers and after he received his I-A classification, but that he hadn't received any further classification since that time.

Mr. Carr: That is all, Mr. Dingman.

ROBERT EARL HOPPER, JR.,

being duly sworn, testified as follows:

By Mr. Carr:

Q. Your name is Robert Earl Hopper, Jr?

A. That is correct.

(Testimony of Gerald T. Bigaouette.)

Q. And your Order number is 217 with the Yavapai County Local Board of the Selective Service? A. That is right.

Q. You prepared and signed and swore to the statements in your questionnaire on November 23, 1940? A. Yes sir, I did.

Q. I hand you the Selective Service questionnaire in your file. Is that your signature?

A. That's it.

Q. Is it a fact in that questionnaire, under Series VIII, relating to ministers or student preparing for the ministry, you made the statements: "I am not a minister of religion. I do not customarily serve as a minister. I have been a minister of the Truth for Jehovah's Witnesses since October '39. I have been formally ordained. If so, my ordination was performed on by God." Are those the statements contained in your questionnaire?

A. Yes sir.

Q. You have heard the statement of Mr. Dingman in regard to advising you that you had the opportunity to change the statement in your questionnaire and make claim as a minister of religion? A. That is right.

Q. And you were instructed by him as the local officer of the organization of Jehovah's Witnesses that you had that opportunity?

A. That is right.

Q. You state that you received notice of

(Testimony of Gerald T. Bigaouette.)

classification as Class I-A sometime in December, 1940, and that then you filed your Affidavit on DSS Form 47, Special Form for Conscientious Objector, subscribed and swore to the same on the 28th day of December, 1940?

A. That is correct.

Q. This is your signature on this affidavit in your file? A. Yes sir.

Q. Now, you claimed that you did not receive a notification of classification as IV-E by this board? A. That is true.

Q. You further stated you received a communication from Washington in regard to the regulations in camps to be established for conscientious objectors? A. Yes, I did.

Q. When did you receive that communication? A. It was in May.

Q. Of 1941? A. 1941, yes sir.

Q. From whom did you receive this?

A. From the Friends Society of America on Civilian Work.

Q. And that was addressed to you personally? A. Yes sir.

Q. And what, generally, were the contents of that communication and the regulations or instructions you received?

A. Well, they were similar to my general Selective Service blank, as to what kind of work I could do or do better than other work, and the things that were needed in camp, which

(Testimony of Gerald T. Bigaouette.)

church I belonged to, and such matters as that.

Q. And this all related directly to classification of persons as conscientious objectors and anticipated their being sent to Government camps? A. That is true.

Mr. Carr: Have you gentlemen any further questions?

Mr. Berg: Yes, I would like to know what he did with the information he got.

A. I sent it straight back to Washington without signing it.

Q. In other words, you disregarded it?

A. In other words, I sent a notice with it that I had not received any classification and sent it back without signing any name. I signed my name to the slip but not on the questionnaire.

Mr. Seares:

Q. Doesn't it appear to you if you had not received any classification after you filled out your conscientious objector questionnaire it was up to you to contact this office as to why you had not received one?

A. In a way I did, and in a way I didn't.

Q. In other words, you were not interested enough in your classification to find out?

A. I figured it was up to the Board to notify me of this classification after my conscientious objector papers had been returned to this office.

(Testimony of Gerald T. Bigaouette.)

Q. Those were returned in December?

A. That is true, and I never received a classification card.

Q. Didn't you think it was up to you to find out from the Board why you had not received notice of your classification?

A. In a way I did.

Mr. Berg:

Q. When did you receive your notice to go to camp?

A. I received it last Saturday, the 14th. It was mailed June 11th and I received it June 14th, on Saturday.

Mr. Carr:

Q. You received your questionnaire from this office, did you, Mr. Hopper?

A. That is true.

Q. You received your Notice to Appear for Physical Examination?

A. That is true.

Q. You received your Notice of Classification as I-A?

A. That is true.

Q. You received your Special Form for Conscientious Objector from this office?

A. That is true.

Q. You received your Notice to Report for Induction?

A. That is true.

Q. And they all came within two or three days after mailing from this office?

A. That is true.

(Testimony of Gerald T. Bigaouette.)

Mr. Seares:

Q. Did I understand you to say you had to come in to this office to get your forms for conscientious objector? A. That is right.

Q. In other words, that was not sent through the mail? A. No.

Mr. Berg:

Q. How long after you received your questionnaire and filled it out as a conscientious objector did you wait to come in to the office to get the form?

A. Why, I notified this office and wrote them to send it down. I wouldn't say for sure, but it was no doubt ten days.

Q. In other words, you did not wait very long?

A. I waited as long as the time I am given by the Board to act. They are supposed to be sent out with your general questionnaire.

Mr. Seares:

Q. In other words, how long after you received your classification of I-A was it before you came in to ask for the form for conscientious objector.

A. I wrote in right after that. I don't remember how long.

Mr. Carr: The record shows that the classification of I-A was made on December 7, 1940, and that the Affidavit of Conscientious Objector was filed on December 31, 1940. I don't find anything——

(Testimony of Gerald T. Bigaouette.)

Mr. Berg: In other words, there is no request filed about a conscientious objector form?

Mr. Carr: Oh, yes, there is a slip here (reading) "Please send me blanks for conscientious objectors."

Q. Mr. Hopper, to sum up the whole situation, you are making your claim now as a minister of religion? A. That is true.

Q. And even though you did not receive your notification of classification as IV-E, according to your statement, you were given the opportunity and instructed by Mr. Dingman to change your questionnaire in order that that classification might be made?

A. I was informed but I hadn't heard from the Board and didn't consider it was necessary at that time. My classification hadn't come and I hadn't heard from the Board.

Q. Now, state as briefly as you can what your objection is to going to camp to serve in some non-military work of national importance.

A. We are entirely neutral to the affairs of the world. We are not part of the world and do not believe in joining up with any party religious, political or commercial. All nations are against God and his kingdom. Therefore, we cannot serve two masters.

Q. But you do engage in industry and com-

(Testimony of Gerald T. Bigaouette.)

merce for the purpose of your maintenance and support, do you not?

A. Yes, that is, to make a living, to support ourselves, which is considered other than that, entirely apart from that.

Mr. Carr: That will be all.

CERTIFICATE

I, Nellie G. Prince, Assistant Clerk and stenographer of Yavapai County Local Board of Selective Service, Prescott, Arizona, hereby certify that William Robert Dingman and Robert Earl Hopper, Jr., being first duly sworn by Alfred B. Carr, Chairman of the Board, duly testified before the Local Board of Yavapai County on June 20, 1941; that to the best of my ability I took down in shorthand the questions propounded to them and the answers given by them and transcribed the same. That the foregoing questions and answers so taken down in shorthand and transcribed by me are to the best of my ability, knowledge and belief the questions propounded to the witnesses and the answers given by them.

Dated at Prescott, Arizona, June 24, 1941.

NELLIE G. PRINCE

CERTIFICATE

I, Alfred B. Carr, Chairman of the Local Board of Yavapai County, Selective Service, hereby certify that William Robert Dingman and Robert Earl Hopper, Jr., being first duly sworn by me, testified before the Local Board on June 20, 1941 at Prescott, Arizona. That Nellie G. Prince, Assistant Clerk and stenographer of the Local Board, took down the questions propounded to said witnesses and the answers given by them and transcribed the same. That I have read the foregoing transcript of the testimony, and to the best of my recollection, knowledge and belief the same contains the questions propounded to said witnesses and the answers given by them.

Dated at Prescott, Arizona, June 24, 1941.

ALFRED B. CARR

Chairman of the Board

Thereupon the witness,

HARRY F. DISE,

was sworn on behalf of the Government and testified as follows:

“A. I am presently employed as clerk of the Yavapai County Local Board, Selective Service System.

(Testimony of Harry F. Dise.)

Q. And when did you enter that employ?

A. On the 1st day of January, 1941.

Q. And you have been continually in that position since then? A. Yes, sir.

Q. And your duties—what are your duties as such? [56]

A. Well, the duties of the clerk of the local Board is, under the regulations, made custodian of the records of the office and he supervises the routine office work.

Q. And when you went in there you took over the records that formerly had been in the custody and kept by Mr. Bigaouette?"

Thereupon the plaintiff offered in evidence the following paper, being Government's Exhibit No. 3:

GOVERNMENT'S EXHIBIT No. 3

"To be filled out in ink or on typewriter
SELECTIVE SERVICE QUESTIONNAIRE
Order No. 217

Date of mailing November 19, 1940

Yavapai County Local Board

P. O. Prescott, Arizona

Name

Robert	Earl	Hopper, Jr.
(First)	(Middle)	(Last)

NOTICE TO REGISTRANT

You are required by the Selective Training and Service Act of 1940 to fill out this Ques-

(Testimony of Harry F. Dise.)

tionnaire truthfully and to return it to this Local Board on or before the date shown below. Willful failure to do so is punishable by fine and imprisonment.

This Questionnaire must be returned on or before November 24, 1940.

HARRY F. DISE

Member of Local Board

INSTRUCTIONS

This Questionnaire is intended to furnish the Local Board with information to enable it to classify you in one of the following Selective Service Classes.

Class I includes men who are available for induction into the armed forces of the United States.

Class II includes those whose induction is deferred because of the importance to the Nation of the service they are rendering in their civilian activities.

Class III includes those whose induction is deferred because they have persons dependent upon them for support.

Class IV includes those whose induction is deferred by law and those unfit for military service.

You will receive notice from your Local Board of your classification.

(Testimony of Harry F. Dise.)

Oaths required in the Questionnaire may be administered by (1) a member or chief clerk of a Local Board or Board of Appeal member or associate member of an Advisory Board for Registrants, or a Government Appeal Agent; (2) any Postmaster, Notary Public, or any Federal, State, county, or municipal officer authorized by law to administer oaths generally or for military purposes. No fee should be charged for this service.

Advisory Boards for Registrants are organized to assist registrants in completing their Questionnaires. No charge will be made for this [57] service. If there is no Advisory Board available, you must nevertheless complete your Questionnaire.

If the registrant is an inmate of an institution and is unable to complete the Questionnaire, the executive head of the institution shall communicate these facts immediately to the Local Board.

1. Make no alterations in the printed matter in this questionnaire.

2. Write the applicable words in the spaces provided in the Questionnaire.

3. If you furnish additional information or affidavits with your questionnaire, attach the same securely to it.

4. If you are already in the active military or naval service, obtain a certificate to that

(Testimony of Harry F. Dise.)

effect from your commanding officer and attach same to your Questionnaire.

5. After this Questionnaire has been returned, report to your Local Board at once any change of address or any new fact which may affect your classification.

When a notice affecting you is posted at the office of your Local Board, you are bound to perform the duty required even if no notice reaches you by mail.

Any statements in this Questionnaire marked (Confidential) are for information only of the officials duly authorized under the regulations to examine them.

D.S.S. Form 40

Yavapai County Local Board

Nov. 27, 1940

P.O. Bldg. Prescott, Arizona.

Statements of the Registrant

Series I.—Identification

Instructions.—Every registrant shall fill in all statements in this series.

1. My name is

Robert

Earl

Hopper

(First name) (Middle name) (Last name)

2. In addition to the name given above, I have also been known by the names of.....

3. My residence is Camp Verde Yavapai
Arizona

(Testimony of Harry F. Dise.)

3. My residence is (Town—City, town or village) Camp Verde (County) Yavapai (State) Arizona.

4. My telephone number is none

5. My social security number is none

Series II.—Physical Condition (Confidential)

Instructions.—Every registrant shall fill in all statements in this series.

1. To the best of my knowledge, I have no physical or mental defects or diseases. If so, they are

2. I am not an inmate of an institution. If so, its name is

Series III.—Education

Instructions.—Every registrant shall fill in all statements in this series.

1. I have completed 8 years of elementary school and 4 years of high school.

2. I have had the following schooling other than elementary and high school:

Name of Vocational School, College, University of Arizona Study Agriculture Length of time attended 1½ years

Series IV.—Occupation or Activity.

Instructions.—All registrants shall fill in Statement No. 1 in this series [58] except No. 9. Every registrant who is now prevented from working merely because of some seasonal or temporary interruption shall fill in all state-

(Testimony of Harry F. Dise.)

ments except statements numbered 2 through 8 in this series.

As used in this series, words such as occupation, work, and job apply to services rendered in any endeavor and to training or preparation for any endeavor.

1. I am working at present.

2. The job I am working at now is (give full title, for example: Construction draftsman, turret-lathe operator, stationary engineer, farm laborer, prosecuting attorney, physics teacher, medical student, policeman, marriage license clerk, etc.):

Farm laborer and Cattle Raiser

3. I do irrigating, work in hay, brand cattle.

4. I have done this kind of work for five years

5. My average earnings per week are \$25.00

6. In this job I am an employee, working for a salary.

7. My employer is Earl Hopper, Camp Verde, Arizona, whose business is farming.

8. Other business or work in which I am now engaged is none.

9. If you are not now working because of some seasonal or temporary interruption, attach to this page a statement (a) explaining what the interruption is, when it began, and when you expect to be able to resume your work, and (b) supplying substantially the same in-

(Testimony of Harry F. Dise.)

formation regarding your last job as is required in the above items in this series.

10. I am not licensed in a trade or profession; if so, I am licensed as.....

11. I am not at present an apprentice under a written or oral agreement with my employer.

12. Other facts which I consider necessary to present fairly the occupation which I have described, or my connection with it, as a ground for classification are (if none, write "None"): none.

Instructions.—You may attach to this page any statement from your employer which you think the Local Board should consider in determining your classification. Such statement will then become a part of this Questionnaire.

Series V.—Other Occupational Experience.

Instructions.—Every registrant shall fill in this statement. Include any formal apprenticeship served.

1. I have also worked at the following occupations other than my present job, during the last 5 years: (if none, write "None")

Occupation	Kind of work done	Years worked
None		

Series VI.—Agricultural Occupations.

Instructions.—Every registrant who works on a farm shall fill in this series, in addition to filling out Series IV and V above.

(Testimony of Harry F. Dise.)

1. I work on or operate a farm as—Wage hand (hired man)

2. I have farmed for 5 years.

3. I do live on the farm with which I am connected.

4. I am actually and personally responsible for the operation of the farm on which I work.

5. The principal crops and livestock of the farm I operate or work on are:

Name of Crops	Acres devoted to each	Kinds of Livestock	No. of Each Now on farm
Alfalfa, grain	15 A Alfalfa		20
pasture	40 A grain	Herford Cattle	180 on range.

[59]

6. The number of hands employed on this farm is one.

7. Other facts which I consider necessary to present fairly the agricultural enterprise I have described and my connection with it as a ground for classification are None.

Series VII.—Dependency (Confidential except as to names and addresses of claimed dependents.)

Instructions.—Every registrant shall fill in the statements numbered 1, 2 and 3 in this series.

1. (a) I am single (b) If married, I married my present wife at..... Series VII.

(Testimony of Harry F. Dise.)

2. I have none children who are under 18 years of age or are physically or mentally handicapped, and who live with me.

“Dependent”. As used in this series defined.

The word “dependent,” as used in this series, means any person to whose support the registrant contributes more than merely a small part of such person’s support (or to whose support the registrant would contribute were he not temporarily prevented from so doing by the registrant’s physical or economic situation) who is either (a) the registrant’s wife, divorced wife, parent, foster parent, or grandparent, or (b) the registrant’s child, unborn brother, half-brother, sister, or half-sister who is under 18 years of age or is physically or mentally handicapped, or (c) a person whose support the registrant has assumed in good faith, who is either under 18 years of age or is physically or mentally handicapped.

Only a person who is a United States citizen or who lives in the United States or its Territories or possessions may be regarded as a dependent.

Based on the information contained in this Questionnaire and on other information which the Local Board may receive, the Local Board will determine whether the “dependent” is an individual who is dependent in fact for support in a reasonable manner in view of such indi-

(Testimony of Harry F. Dise.)

vidual's circumstances on income earned by the registrant by his work in a business, occupation, or employment.

Instructions.—Only those registrants who believe that one or more persons are dependent for support on the registrant's earnings from his work are required to fill in the statements numbered 3 through 12 in this series.

3. The following persons live with me in a home maintained by me and are entirely or partly dependent on my earnings from my work in my business, occupation, or employment, and have no other source of income except as stated below.

None.

The net cost to me of maintaining my home during the last 12 months, after deducting \$..... contributed by other than myself for the support of such dependents was \$.....

4. The following persons do not live with me in a home maintained by me, but are entirely or partly dependent on my earnings from my work in my business, occupation, or employment, and have no other source of income except as stated below.

None. [60]

5. The cause of the dependency of any persons over 18 years of age (excluding my wife) listed above is as follows: (Give the name and

(Testimony of Harry F. Dise.)

a full statement of cause for dependency in each case.) None.

6. Of my dependents, only the following are receiving a part of their support from persons other than myself. (Give name of dependent, name and address of other person or agency contributing to his support, and amount so contributed in cash or other things of value by such other person or agency during the last 12 months.)

7. Of the amounts contributed by me to dependents listed above only \$..... contributed to..... was in payment for my own board and/or lodging.

8. The income I earned from my work in my business, occupation, or employment during the past 12 months was \$.....

9. My income from all other sources during the past 12 months was \$.....

10. The following is a list of all property owned by (or held in trust for) either me or my dependents, the value of such property, and the net income received by either me or my dependents from such property during the past 12 months: (List this information separately as to the registrant and each dependent. Do not include clothing, personal effects or household furnishings; or cash less than \$500. Indicate which of such property is your home.)
None.

(Testimony of Harry F. Dise.)

11. I do not rent the house in which I live. If so, the monthly rent is \$....., and the name and address of my landlord is Earl Hopper.

12. Other facts which I consider necessary to present fairly my own status and that of my dependents as a basis for my proper classification are: None.

Instructions.—With respect to any dependent (other than the registrant's own wife, child, parent, or grandparent) whose support the registrant has assured, attach to this page a statement explaining why and under what circumstances the registrant assumed such person's support. Such statement will then become a part of this Questionnaire.

Supporting Affidavit of Dependents Over 18 Years of Age.

Instructions.—If convenient, each dependent over 18 years of age except the registrant's wife shall swear to (or affirm) the following affidavit. The registrant shall furnish the Local Board a separate affidavit from each such dependent who does not sign the affidavit below. Blanks for this purpose will be supplied by the Local Board on request.

State of County of

We the undersigned do solemnly swear (or affirm) each for himself and herself individu-

(Testimony of Harry F. Dise.)

ally, that we have read or had read to us the foregoing statements under the heading "Dependency" that we understand the same; that we are named as dependents; that the statements contained therein as to the name, age, residence, relationship, and dependency of each of us toward said registrant, and the statements of his contributions and the contributions by other persons to the support of each of us and the statements of the financial and material condition of each of us, and of the income of each of us from all sources, are true.

.....
(Signature of dependent)

.....
(Signature of dependent) [61]

Subscribed and sworn to before me this
day of 19

.....
(Signature of officer)

.....
(Designation of officer)

Series VIII.—Minister, or Student Preparing
for the Ministry.

Instructions.—Every registrant who is a minister or a student preparing for the ministry shall fill in the statements in this series that apply to him.

(Testimony of Harry F. Dise.)

1.(a) I am not a minister of religion.

(b) I do not customarily serve as a minister.

(c) I have been a minister of the Truth for Jehovah's Witnesses since October 39.

(d) I have been formally ordained. If so, my ordination was performed on by God at

3. I am not a student preparing for the ministry in a theological or divinity school.

4. I am attending the which was established September 16, 1939, and is located at.....

Series IX.—Citizenship

Instructions.—Every registrant shall fill in the statements numbered 1, 2, 3 and 4 of this series.

1. I was born at (Town) Garden Grove California (Country) United States.

2. I was born on October 8, 1918.

3. My race is White.

4. I am a citizen of the United States.

Instructions.—Every registrant who is not a citizen of the United States shall fill in the statements numbered 5, 6, 7, 8, 9.

5. I a citizen or subject of

6. My permanent residence has been in the United States since.....

(Testimony of Harry F. Dise.)

7. I filed a declaration of intention to become a citizen of the United States (first papers). Declaration filed at on under No.

8. I filed a petition for naturalization (second papers). Petition filed at on

9. I registered with the Alien Registration Division, United States Department of Justice, under Alien Registration Act of 1940. Registration receipt card number, if received [62]

Series X.—Conscientious Objection to War.

Instructions.—Only registrants who are conscientiously opposed to combatant or noncombatant military service by reason of their religious training and belief shall fill in this series, and shall obtain from the Local Board a special form on which to give substantiating evidence of conscientious objection. The Local Board will determine whether the registrant shall be classed as a conscientious objector on the basis of the claim made and the information contained in the special form.

I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors because I am conscientiously opposed, by reason of my religious training and belief, to the type or types of service checked below.

X Combatant military service

X Noncombatant military service.

(Testimony of Harry F. Dise.)

Series XI.—Court Record (Confidential)

Instructions.—Every registrant shall fill in statement Number 1.

1. I have not been convicted of treason or a felony.

Instructions.—Every registrant who has ever been convicted of such an offense shall fill in the statements numbered 2, 3, and 4.

2. The offense was.....

3. The approximate date of conviction was

.....
(Month) (Day) (Year)

4. The name and location of the court was
(Name)

Series XII.—Military Service (Confidential)

Instructions.—Every registrant who now is or has been a member of the armed forces of the United States shall fill in the statements in this series. (Use a separate line for each term of service.)

My military service has been as follows: Arm of Service: None.

Series XIII.—Students, Present Members of Armed Forces, Certain Officials, etc.

Instructions.—Every registrant who is a member of one or more of the groups named in this series shall check the appropriate item

(Testimony of Harry F. Dise.)

or items, and shall supply any further information called for under the item or items checked.

I am at present:

A college or university student, having entered upon attendance for the academic year 1940-41 at (Name of College) On 1940.

This college or university is located at I am pursuing a course of study involving hours of attendance per week leading to the (Name of Degree or Certificate). I request that if I am selected for training, my induction be postponed until the end of the present academic year, which ends on (Month) 1941.

A commissioned officer, warrant officer, pay clerk, or enlisted man of the Regular Army, the Navy, the Marine Corps, the Coast Guard, the Coast and Geodetic Survey, the Public Health Service, the federally recognized active National Guard, the Officers' Reserve Corps, the Regular Army Reserve, the [63] Enlisted Reserve Corps, the Naval Reserve, or the Marine Corps Reserve; my rank or commission is in the (Name of Service)

A cadet, United States Military Academy; midshipman, United States Naval Academy; cadet, United States Coast Guard Academy; man who has been accepted for admittance

(Testimony of Harry F. Dise.)

(commencing with the academic year next succeeding such acceptance) to the United States Military Academy as cadet, to the United States Naval Academy as midshipman, or to the United States Coast Guard Academy as cadet, and whose acceptance is still in effect; cadet of the advanced course, senior division, Reserve Officers' Training Corps or Naval Reserve Officers' Training Corps; I am (A cadet, midshipman) (or accepted for admittance) in (Name of corps, academy, etc.).

The Governor of a State or Territory, a member of a legislative body of the United States or of a State or Territory, a judge of a court of record of the United States or of a State or Territory or the District of Columbia; my office is

Registrant's Statement Regarding Classification

Instructions.—It is optional with registrant whether or not he fills in this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. The local board is charged by law to determine the classification of the registrant on the basis of the facts before it which should be taken fully into consideration regardless of whether or not this statement is filled in.

(Testimony of Harry F. Dise.)

In view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class (See Instructions Page 1).

The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the Local Board in determining his classification.

I am one of Jehovah's Witnesses and as such I am entirely neutral to the affairs of this world, based on the booklet "Neutrality."

Registrant's Affidavit

Instructions.—1. Every registrant shall make the registrant's affidavit. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the officer who administers the oath.

State of Arizona,
County of Yavapai.

I, Robert Earl Hopper Jr., do solemnly swear (or affirm) that I am the registrant named and described in the foregoing statements in this Questionnaire, that I have read (or have had read to me) the statements made by and about me, and that each and every such

(Testimony of Harry F. Dise.)

statement is true and complete to the best of my knowledge, information and belief.

Registrant sign here:

ROBERT EARL HOPPER JR.

Subscribed and sworn to before me this 23 day of Nov. 1940.

JESSIE STEPHENS

(Signature of Officer)

Postmaster

(Designation of Officer)

[64]

If the registrant has received assistance from an advisor, the latter will sign the following statement:

I have assisted the registrant herein named in the preparation of this Questionnaire.

FERN HOPPER

Advisor.

Instructions: Registrant shall write nothing below this line when filling out the Questionnaire.

Minute of Action on Request for Extension of Time for Filing Claim or Proof.

The application of.....to have time for filing claim or proof extended to.....19.....
(granted) for the reason that.....
(refused)

.....
(Date)

.....
(member)

(Testimony of Harry F. Dise.)

Minute of Action by Local Board

The Local Board classified the registrant in Class I, Subdivision A, by the following vote:
Ayes 3 Noes 0.

December 7, 1940

(Date)

ALFRED B. CARR

Member.

Appeal to Board of Appeal.

I hereby appeal from the classification by the
Local Board in Class....., Subdivision.....

.....
(Date) (Signature of person appealing)

Instructions.—You must also attach here a written statement specifying the class or classes in which you think you should be placed. If you wish the appeal board to review a determination regarding your physical or mental fitness, you must fill out and sign the form for appeal on the Report of Physical Examination (Form 200) and you must attach to that form a statement specifying the class or classes in which you think you should be placed.

Minute of Action by Board of Appeal

The Board of Appeal classifies the registrant in Class..... Subdivision..... by the following vote: Ayes..... Noes.....

Date.....

Member

(Testimony of Harry F. Dise.)

I Hereby appeal to the President from classification by the Board of Appeals in Class....., Subdivision..... Certificates and recommendations required by section 379 S.S.R., are attached.

.....
(Date)

.....
(Signature of person appealing)

[65]

Minutes of Other Actions

Dates

January 3, 1941 Classification of Dec. 7, 1940, made before receipt of Form 47. On this date reclassified as IV E by vote of 3 Ayes, 0 Noes.

ALFRED B. CARR.

January 7, 1941 Report from Appeal Agent indicates that Jehovah's Witnesses and recognized sect opposed to war in all forms.

J. H. MORGAN.

And the said witness, Harry F. Dise, testified thereto as follows:

"Q. I show you now Government's Exhibit No. 3 for Identification and ask you if this is one of the records which you took over at that time?

A. Yes, sir; that record was in the file when I took over.

(Testimony of Harry F. Dise.)

Q. Now, I will ask you to examine this exhibit for identification and state whether or not there were any entries made on that after you had charge of the office and had charge of those records?

A. Well, this entry on Exhibit 1, on page 1——

Q. (Interrupting) When was that made, do you recall?

A. That, I think, was made at the time of the preliminary hearing in this case.

Q. That was the identification mark before the Commissioner?

A. Yes, sir; before the Commissioner in Prescott. On the last page of this questionnaire, the minute action of the local Board of December 7th, 1940, the minute action, that was on there when I took over, but the minutes of other actions of January 3d, 1941, and January 7th, 1941——

Q. (Interrupting) All right, now referring to January 3d, 1941. Do you know who made that entry?

A. That entry was made by the chairman of the Board, Alfred B. Carr, at a meeting of the local Board.

Q. And the next entry of December 7th, 1941, by whom was that made?

A. That was made by Mr. Morgan, who is also a member of the local Board.

(Testimony of Harry F. Dise.)

Q. And these are in their respective handwriting, is that right? A. Yes, sir.

Q. And that is a part of this record and is a part of the permanent records kept there in the office? A. Yes, sir.

Mr. Flynn: We now offer Government's Exhibit No. 3 in evidence.

Mr. Clark: Well, we object to it until it be shown—unless it be shown it is the questionnaire signed by the defendant and in some way connected up with the defendant in this case, your Honor. We say that it is [66] not competent and without in some way connecting it with this defendant.

The Court: It may be received.

(The document was received as Government's Exhibit 3 in evidence.

Mr. Clark: May we have an exception?

The Court: Yes."

Thereupon the plaintiff offered in evidence the following:

"GOVERNMENT'S EXHIBIT 2-B,
being all of Government's Exhibit 2, hereinbefore set out and not introduced as a part of Government's Exhibit 2, or Government's Exhibit 2-A."

And the witness, Harry F. Dise, testified thereto as follows:

"Mr. Flynn:

Q. Now, Mr. Dise, calling your attention to

(Testimony of Harry F. Dise.)

Government's Exhibit 2A in evidence, does the line following the number 217 under the name of the registrant, Robert Earl Hopper, I will ask you to follow that line through and see if there are any entries made in this record, made by you or under your direction while you were in charge of the records of that office?

A. On this line, the first entry I made was following number 217. I didn't put the number in, but following that is a small "s" in pencil which has no affect whatever, of course, upon his classification, and it is just the manner that I make notations with in pencil in order to make periodical reports to our State headquarters. It is just a key for me to follow in making these reports. I drew a red line through the "X".

Q. That is Column 13-A?

A. Yes, sir; and at the same time inserted in Column 13 under "4" the letter "E".

Q. What was the purpose of that entry; what does it indicate?

A. Well, it indicates a re-classification as made by the local Board.

Q. From class 1-A to what?

A. To class 4-E.

Q. And that is the conscientious objector classification?

A. Yes, sir; and I likewise posted under Column—in Column 16 the figures "1-3-41",

(Testimony of Harry F. Dise.)

and in Column 28, in red, I have posted "re-classified", and abbreviated it, "1-3-41".

Q. And that indicates the date of the re-classification? [67]

A. That indicates the date in which the notice of this new classification or re-classification was mailed to the registrant.

Q. Have you any records of that notice?

A. The records are contained in that——

Q. (Interrupting) This is the record (indicating document)?

A. That is the record required under the Selective Service Law and the regulations thereunder.

Mr. Flynn: At this time, your Honor, we wish to offer in evidence the balance of the line which has been marked as Government's Exhibit 2A in evidence, those entries which this witness has just testified that he made, and in connection with that I'd like to also offer as a part of this exhibit the headings to the columns and the heading and title of the document "Classification Record, Local Board for Yavapai County, Arizona", the page numbers and the column headings together with the entire line which has been marked, a part of it now in evidence as Government's Exhibit 2A.

Mr. Clark: We make the same objection that we made as to the balance of the record, your Honor.

The Court: It may be received.

Mr. Clark: Note an exception."

Thereupon, on said 27th day of March, 1942, the plaintiff having rested, the defendant made the following motion, to-wit:

"Mr. Clark: The defendant respectfully moves the Honorable court to direct the jury to return a verdict of not guilty upon the following grounds: One, that the indictment is totally defective, that it does not charge a public offense or crime; two, that the statute upon which this action is based, to-wit: Title 50, Section 301, and those sections following 301 to 311 of Title 50, is unconstitutional and void, in that it violates the First Amendment to the United States Constitution, in that it places a penalty on religion and prohibits the free exercise of religion, and in that said statute violates the 5th Amendment to the U. S. Constitution, in that upon its face and as construed and applied, said statute deprives defendant of liberty and property without due process of law; that said act on its face and as construed and applied violates the 13th Amendment to the constitution of the United States, in that it subjects the defendant to involuntary servitude not as punishment for crime, and upon the further ground that said statute attempts, unlawfully, to delegate legislative powers to private, non-governmental agencies, or to private indi-

viduals. And upon the further ground that said statute delegates judicial power to sentence for an unlimited term of involuntary servitude without opportunity to be heard to a non-judicial tribunal. Three, that no public offense has been proved, nor has any crime been proved against this defendant."

Thereupon, the court made the following ruling upon the foregoing motion for a directed verdict:

"The Court: The motion will be denied. Call in the jury.

Mr. Clark: Exception, please." [68]

The defendant presents the foregoing as his proposed Bill of Exceptions in the above entitled matter, and prays that the same may be settled and allowed.

Dated this 11 day of May, 1942.

CHARLIE W. CLARK,
Attorney for Defendant
1930 W. Adams Street,
Phoenix, Arizona.

The foregoing Bill of Exceptions is correct and may be settled and allowed by the Court.

Dated: May 14, 1942.

FRANK E. FLYNN,
United States Attorney,
Frank E. Flynn.

The foregoing Bill of Exceptions is correct and is hereby settled, allowed and approved.

Dated: May 15, 1942.

DAVE W. LING

Judge of the United States
District Court.

[Endorsed]: Filed May 15, 1942. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. [69]

CLERK'S CERTIFICATE TO
TRANSCRIPT OF RECORD

In the United States District Court
for the District of Arizona.

United States of America
District of Arizona—ss:

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said Court, including the records, papers and files in the case of United States of America, Plaintiff, versus Robert Earl Hopper, Defendant, numbered C-6163 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 70, inclusive, contain a full, true and cor-

rect transcript of the proceedings had in said cause, and of all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Defendant's Praecipe on Appeal filed therein and made a part of the transcript attached hereto, as the same appear from the originals of record remaining on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid, except the Reporter's Transcript and all exhibits offered or admitted in evidence at the trial of this action.

I further certify that the duplicate reporter's transcript, and a certified copy of Government's Exhibits 2, 2A and 2B, and all original exhibits except said exhibits 2, 2A and 2B, offered or admitted in evidence, are transmitted herewith pursuant to the order of the court entered May 26, 1942.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record amounts to the sum of \$13.40 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 29th day of May, 1942.

(Seal)

EDWARD W. SCRUGGS,

Clerk

By WM. H. LOVELESS,

Chief Deputy Clerk. [71]

[Endorsed]: No. 10110. United States Circuit Court of Appeals for the Ninth Circuit. Robert Earl Hopper, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed June 1, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10110

UNITED STATES OF AMERICA,

vs.

ROBERT EARL HOPPER JR.,

Defendant.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL.

The Appellant relies upon the assignments of error appearing in the transcript of the record as the Statement of Points on which Appellant intends to rely on Appeal and hereby refers to said Assignments of Error as appearing in said transcript and

adopts the same as his Statement of Points on which Appellant intends to rely on appeal and incorporates the same herein, at this point, by reference as though set out herein in full.

CHARLIE W. CLARK

Attorney for Appellant.

Copy received June 8, 1942.

F. E. FLYNN

U. S. Atty.

[Endorsed]: Filed Jun 10 1942. Paul P. O'Brien,
Clerk.

No. 10110

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROBERT EARL HOPPER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**Upon Appeal from the District Court of the United States
for the District of Arizona**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, December 6, 1943.

Before: Wilbur, Garrecht, Denman, Stephens and
Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. E. S. Clark, counsel for appellant, and by Mr. Frank E. Flynn, United States Attorney, counsel for appellee, and, pursuant to oral stipulation of said counsel, submitted To Wilbur, Garrecht, Denman, Mathews, Stephens and Healy, Circuit Judges, for consideration and decision, with leave to counsel for respective parties to file further briefs 10 X 10.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings Monday, December 6,
1943.

Before: Wilbur, Garrecht, Denman, Mathews,
Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS,
AND FILING AND RECORDING OF
JUDGMENT

By direction of the Court, Ordered that the type-written opinion, concurring opinion, and dissenting opinion, this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United
States for the District of Arizona

OPINION, CONCURRING OPINION AND
DISSENTING OPINION

Before: Wilbur, Garrecht, Denman, Mathews,
Stephens, and Healy,
Circuit Judges.

Healy, Circuit Judge

This appeal is from a judgment of conviction under §11 of the Selective Service and Training Act of 1940, 50 USCA §311. On an earlier hearing, in an unreported opinion, the judgment was reversed on the ground of the insufficiency of the indictment. A rehearing was granted and the case was again argued, this time before the court sitting en banc. In view of the different result now reached we deem it advisable fully to recite the facts and to state our conclusions somewhat more at length, perhaps, than the gravity of the questions justifies.

Appellant is a native born citizen of the United States, and at the time of his registration under the Selective Service Act in October, 1940, he was twenty-two years old. He was then residing in Yavapai County, Arizona, of which Prescott is the county seat. On November 19, 1940, he filed with the Selective Service Board at Prescott his questionnaire showing the above facts and describing himself as a farm laborer and cattle raiser and as

being unmarried and without dependents. In the questionnaire he stated that he is not a minister of religion and does not customarily serve as a minister, but that he is one of Jehovah's Witnesses and as such is entirely "neutral to the affairs of this world."

He was directed to report for physical examination, was examined, and was found fit for general service. He was thereupon, on December 7, 1940, placed in Class 1-A and was so notified. A short time later, at his request, he was furnished with a conscientious objector form, which he filled out and returned to the board under date of December 31, 1940. In this report he again described himself as one of Jehovah's Witnesses and as neutral in mundane affairs. He did not assert that he was a minister, but claimed only exemption from service under direction of the military because conscientiously opposed by reason of his religious belief to participation in war in any form. Under date of January 20, 1941, in line with the registrant's own report, the local board reclassified him, placing him in Class IV-E, that is to say, in the category described in §5(g) of the Act as one assignable to work of national importance under civilian direction. Notice of this classification was mailed him at the time.

In May 1941, the National Director of the Selective Service System directed appellant's assignment to work of national importance in the civilian camp at Glendora, California. On June 11, 1941, an order to report for such duty, entitled in the name of the President of the United States and signed by a

board member, was mailed him.¹ The date specified for his appearance was June 22, 1941, at 8:00 P. M. Appellant, in response to the notice, went to Prescott, contacted the board on June 19, and advised its members that he wished to appeal his classification on the ground that he was a minister, although he appears to have made no claim that his status in this respect had changed since the date of his registration. He was told, according to his own testimony, that he had waited too long and was not entitled to an appeal.² He claimed, however, that he had not received the notice of his IV-E classification mailed him in January.³

Next day, June 20, 1941, he appeared before the board and the members thereof interrogated him, apparently for the purpose of satisfying themselves whether there was any ground for considering his claim to be a minister and to determine his good faith or the lack of it.⁴ Appellant's statements

¹This order recited that he had been classified as a conscientious objector, Class IV-E.

²Under the then regulations an appeal from a classification was required to be taken within ten days.

³Regulation 601.158, Code of Federal Regulations [1940 Supplement, p. 4415], provides in part as follows: "The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication whether he actually receives it or not."

⁴There is no reason for cataloging this inquiry as a proceeding for reclassification under the regulations, and it is abundantly clear that the board did

made at that time were taken by a stenographer and the transcribed questions and answers were introduced as an exhibit upon the trial of the case, forming part of the record here. In response to questioning by board members appellant, without further explanation, admitted having stated in his questionnaire that he was not and did not serve as a minister. While continuing to deny receipt of the notice of his IV-E classification he admitted having received all other communications directed to him by the board. He admitted that in May 1941 he had received from a Quaker organization in Washington a letter concerning his prospective service in the civilian camp, but had disregarded it. He admitted also having been told in May by a company servant of Jehovah's Witnesses that he might by changing his questionnaire be classified as a minister. This suggestion, too, he admitted having disregarded. From his story the board was warranted in believing not only that he was trifling with the truth when he denied knowledge of his IV-E classification, but that his present claim to exemption as a minister was a mere pretense.

On June 22, 1941, at the hour specified in the order requiring appellant to report, he presented himself to the board's administrative officer who again instructed him that it was his duty to go to

not so regard it. Appellant has at no time contended that the hearing effected a vacation or suspension of his existing classification. It was the position of his counsel on the trial that the board arbitrarily denied his claim to be classed as a minister.

the Glendora camp. His transportation and means for obtaining meals on the journey were tendered him but he declined to accept them, stating that he was appealing his case to state and national authorities and was not going to camp. It appears to have been his position then, as it was later at the trial, that he had the right to disobey while presently appealing from a classification made five months before at his own request. In sum, he undertook to formulate his own rules of procedure and to be the judge of his own case.

Thereafter the board brought the matter to the attention of the United States attorney, and appellant was indicted, tried, and convicted under §11 of the Act providing that "any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty," shall upon conviction be punished, etc.

We append the indictment in full in the footnote.⁵

⁵"The Grand Jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the Court aforesaid, on their oath present, that Robert Earl Hopper, having theretofore registered under the Selective Training and Service Act of 1940, on or about or about the 22nd day of June, A. D. 1941, and within the said District of Arizona, did knowingly, wilfully, unlawfully and feloniously fail and neglect to perform the duty required of him under and in the execution of said Act, and the rules and regulations made pursuant thereto, that is to say, that the said defendant, Robert Earl Hopper, having been theretofore classified by his local draft

Appellant moved to quash and later moved for a directed verdict, both times on the ground of the insufficiency of the indictment and the unconstitutionality of the Selective Service Act. The record shows that but one specific ground of insufficiency was urged upon the trial court. We quote this objection on the margin in the language of appellant's then counsel.⁶ The only specifications of insufficiency made in the brief here were (a) that the term "his local draft board," as employed in the indictment, carried no legal meaning; and (b) that the indictment was defective in that it did not state when, where, or to whom the defendant was to report. However, the accused made no demand for a bill of particulars, and it is clear that he experienced no difficulty in understanding the charge and that he suffered no prejudice.

board at Prescott, Arizona, as a conscientious objector, and found fit for general service, did then and there, knowingly, wilfully, unlawfully and feloniously fail and neglect to report as a conscientious objector for civilian work of national importance when notified so to do by his local draft board; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

⁶On the motion for a directed verdict, counsel stated: "Now, on the matter of the first motion, that the indictment fails to state a public offense or crime as set out in the motion to quash, but the motion to quash is not reviewable, so I make the same argument at the time that was made; that is, that the indictment is so indefinite, that it does not charge a public offense; that it does not say to whom he was required to report, nor by whom he was ordered to report and all of the elements of a faulty indictment are present in this indictment."

The indictment charged the crime in the language of the statute, with particulars of the direction given and disobeyed and the time and place of the disobedience. We think the essential elements of the offense are stated, if not directly, certainly by implication. In *Crutchfield v. United States*, . . F. 2d . . , we held good, in the absence of objection, an indictment less specific, perhaps, than the present. And in *United States v. Messersmith*, . . F. 2d . . , November 11, 1943, the Court of Appeals of the Seventh Circuit held sufficient an evidently similar indictment saying: "Defendant contends that the indictment is vague and uncertain. It charges that defendant was duly assigned to work of national importance under civilian direction; that the Board directed him to report for such service and that he knowingly, intentionally and willfully failed to comply. This is a valid averment of violation of the law and fully advises defendant of the nature and character of the charge against him."

The courts are admonished by §1025 of the Revised Statutes, 18 USCA §556, that "no indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

At least since *Hagner v. United States*, 285 U. S. 427, the federal courts have determined the sufficiency of criminal pleadings on the basis of practical as opposed to technical considerations. As said by

the court in that case, p. 431, "the rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and 'sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him or a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction,' " (citing cases). The court further observed, 285 U. S. p. 433, that "upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment."

In the Hagner case the defendant was indicted in the District of Columbia for using the mails to defraud. The charge was that in the execution of the fraudulent scheme he had deposited certain mail matter in the United States Post Office in Pennsylvania, addressed to a person in the District of Columbia. The indictment did not state, in conformity with the statute, that he did "knowingly cause [the letter] to be delivered by mail according to the direction thereon." After conviction the defendant moved in arrest of judgment on the ground that while the indictment showed an offense in Pennsylvania, it failed to charge any offense within the District of Columbia. In support of the indict-

ment the court had recourse to the well known evidentiary presumption that a letter, placed in the post office and properly directed, was actually received by the person to whom it was addressed. "While, therefore," said the court (p. 431), "the indictment does not in set terms allege delivery of the letter, a presumption to that effect results from the facts which are alleged." In holding the indictment sufficient, the court cited §1025 of the Revised Statutes, heretofore quoted.

Many holdings of a cognate character, adhering to the mandate of the quoted statute, are cited by the court in the Hagner opinion, among these being *Dunbar v. United States*, 156 U. S. 185; *Olsen v. United States*, 287 Fed. 85; *Cohen v. United States*, 294 Fed. 488; *Gay v. United States*, 12 F. 2d 433; *Musey v. United States*, 37 F. 2d 673; *Phipps v. United States*, 251 Fed. 879; *Stephens v. United States*, 9 Cir., 261 Fed. 590; *Grandi v. United States*, 262 Fed. 123.

As recently as the present year the Court of Appeals of the Fourth Circuit in *Nye v. United States*, 137 F. 2d 73, speaking through Judge Parker, has reviewed the rule of the Hagner case and its own earlier decision of similar import in *Martin v. United States*, 299 Fed. 287. Said Judge Parker in the *Nye* opinion (p. 76): "Following the decision in the *Martin* case we have consistently followed the rule there laid down, sustaining under a variety of circumstances indictments drawn in general terms where they set forth the ingredients of the offense as defined by statute with sufficient definite-

ness and certainty to apprise the defendant of the crime charged and to protect him against further prosecution for the same offense," (citing cases).

Another forceful recognition of the modern rule is found in an opinion of Judge Learned Hand in *United States v. Polakoff*, 2 Cir., 112 F. 2d 888, a prosecution involving a charge of conspiracy to obstruct justice. Said Judge Hand (p. 890): "The indictment merely alleged that the accused conspired 'to influence and impede the official actions of officers in and of the United States District Court * * * in order that said Sidney Kafton would receive a sentence of not more than one year and one day.' The challenge is that it should have specified who were the 'officers' that were to be so 'impeded.' We do not see why, if the accused were really in ignorance of this detail, they could not have been fully protected by a bill of particulars. Decisions such as *Heaton v. United States*, 2 Cir., 280 F. 697, and *Kellerman v. United States*, 3 Cir., 295 F. 796, are of doubtful service today, when objections which do not go to the substance of a fair trial no longer get much countenance. *Hagner v. United States*, 285 U. S. 427, 431, 52 S. Ct. 417, 76 L. Ed. 861; *Berger v. United States*, 295 U. S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314; *Crapo v. United States*, 10 Cir., 100 F. 2d 996, 1000."

This court, too, has more than once announced the principle stated in the foregoing authorities, and has adhered to the command of the quoted statute. *Woolley v. United States*, 97 F. 2d 258, 261; *Zuziak v. United States*, 119 F. 2d 140, 141. Cf. *Ackerschott*

v. United States, ... F. 2d ..., decided Nov. 11, 1943.

We hold that the indictment is sufficient and that the commission of the offense was amply established.⁷

A few points remain to be noticed. Appellant attacks the Selective Service Act as unconstitutional on the ground that it prohibits the free exercise of religion, deprives appellant of liberty and property without due process, and condemns him to involuntary servitude not as punishment for crime. Also that the Act delegates legislative powers. These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have uniformly met with rejection. Selective Draft Law Cases, 245 U. S. 366; Goldman v. United States, 245 U. S. 474; O'Connell

⁷The bill of exceptions does not contain all the evidence, but we can, in a proper case, under Rule 9 of the Criminal Appeals Rules, order correction of the bill. Ray v. United States, 301 U. S. 158. For that reason we have examined the reporter's transcript of the evidence and the exhibits, which were filed in this court, to ascertain whether a correction of the bill would aid appellant. From such examination it is apparent that it would avail the appellant nothing to have the bill of exceptions amended to include the evidence shown in the transcript. This method of dealing with the problem has been followed for the reason that the parties have referred to the reporter's transcript and in part based their arguments upon it. However, we desire it to be understood that this procedure is not to be taken as establishing a precedent for the use of such a transcript.

v. United States, 253 U. S. 142; United States v. Stephens, 245 Fed. 956; United States v. Herling, 120 F. 2d 236. Congress and the selective service authorities alike have been considerate in their treatment of those possessing scruples against participation in war. Surely it is not expecting too much to require of them that they do civilian work of national importance at a time when their brothers, under the same compulsion, are giving their lives for them and for the Nation. As we have seen, appellant was accorded due process of law. The board did not act arbitrarily, either in classifying him or in directing him to report for service in line with his classification.

Appellant assigns as error numerous rulings on the admission of evidence. His objections were to exhibits comprising his signed questionnaire, his conscientious objector report, and other documents relating to his registration and sufficiently identified as official records of the selective service board. There was no error in admitting these exhibits.

The judgment is affirmed.

Mathews, Circuit Judge (concurring in the result):

Appellant was indicted for violating §11 of the Selective Training and Service Act of 1940, 50 U.S.C.A. §311, and moved to quash the indictment. The motion was denied. Appellant pleaded not guilty and was tried. At the close of appellee's evidence, appellant moved for a directed verdict. The motion was denied. Thereafter appellant introduced evidence, the case went to the jury, and

appellant was convicted, was sentenced and has appealed.

Twelve alleged errors are assigned. Assignment 1 is that the trial court erred in denying appellant's motion to quash the indictment. The denial of such a motion is not reviewable.¹

Assignments 2-11 are that the trial court erred in admitting evidence. These assignments do not, as required by Rule 2(b) of our rules governing criminal appeals, "quote * * * the full substance of the evidence admitted." Hence these assignments need not be considered.²

Assignment 12 is that the trial court erred in denying appellant's motion for a directed verdict at the close of appellee's evidence. Appellant waived the motion by introducing evidence in his own behalf.³

The judgment should be affirmed.

¹Ramirez v. United States, 9 Cir., 23 F. 2d 788, 789; Johnson v. United States, 9 Cir., 59 F. 2d 42, 44; Sutton v. United States, 9 Cir., 79 F. 2d 863, 864.

²Wheeler v. United States, 9 Cir., 77 F. 2d 216, 218; Levine v. United States, 9 Cir., 79 F. 2d 364, 367; Muyres v. United States, 9 Cir., 89 F. 2d 783; Levey v. United States, 9 Cir., 92 F. 2d 688, 692; Waggoner v. United States, 9 Cir., 113 F. 2d 867, 868; Utley v. United States, 9 Cir., 115 F. 2d 117, 119.

³Baldwin v. United States, 9 Cir., 72 F. 2d 810, 812; Sheridan v. United States, 9 Cir., 112 F. 2d 503, 504.

Denman, Circuit Judge, dissenting:

I agree with the majority that it was our duty to examine the transcript of testimony admitted as part of the record upon the stipulation of counsel and quoted from by the appellee in support of its contention that the court had not erred in denying appellant's motion for an instructed verdict because of failure to present showing the offense was committed.

I am unable to agree with Judge Mathews' concurring opinion that we cannot consider, what the Government considered and relied upon on the rehearing, namely, the motion for such an instruction, because it does not appear in the bill of exceptions that the motion was made at the conclusion of the evidence. We have held the exact contrary. In *Bailey v. United States*, 13 F. (2d) 325, in reversing the judgment of the lower court finding the defendant guilty of defrauding the United States, Judge Rudkin's opinion states "We are aware there was no request for an instructed verdict at the close of the testimony, as suggested by counsel; but if *there is no competent testimony to support the verdict of guilty*, and more especially if it *appears affirmatively that no crime has in fact been committed*, the right and duty of this court to order a reversal is not open to question." (Emphasis supplied.)

If there be any group of cases where the requirement of 28 U. S. C. A. 391 to ignore technical defects should be observed, it is in those of the conscientious objectors. The Supreme Court has made clear enough the wrong in the approach of the trial

of Jehovah's Witnesses as if they are all draft dodgers "who should be sent to the front line trenches." A great part of the youth of that religious organization belong to the generation whose adolescence came in the period between the first and second World Wars. That was the period when parents proclaimed "We did not bring our boy into the world to become a soldier." Mothers drilled into their sons the horror of war in which they would have to maim and kill their fellow man.

No doubt draft dodgers hypocritically avail themselves of a pretended acceptance of a religion based upon such principles. However, it is but natural that such a period with such teachings in American families would make the horror and wrong of war a part of the compelling moral convictions of many of their youth.

There is nothing in the evidence of this case to warrant a doubt as to Hopper's sincerity or for the suggestion that he did not tell the truth when he said he had not received a notice of his requested classification. That, under the rule established by the majority, was entirely irrelevant to his guilt. He cannot complain of the failure to receive a notice that he was placed in the very classification for which he applied. In the absence of the judge's instructions it is unfair to Hopper to assume that the judge did not so instruct the jury and hence take from its consideration the question of Hopper's veracity. His testimony at the trial and that of other witnesses that he was a duly appointed minister in his religion and that he had been

preaching its doctrines prior to his application for reclassification as such a minister was not questioned.

It is my opinion that Hopper was entirely justified in his failure on June 22, 1941, to go to the camp to which the board had ordered him. This is because only a registrant in class IV-E is subject to such an order. Before June 22nd, the effective date of the order, that is on June 20th, the board took him from that classification by entertaining his petition for reclassification in IV-D, a minister of religion, and hence subject to no board order. Thereafter they had not classified him "anew" in either IV-D or IV-E as required by the then regulations.

Prior to May 28, 1941, on an application for reclassification the registrant continued in his prior classification during the reclassification proceeding. The regulation appearing at pages 4449-50 of the Code of Federal Regulations, Supplement 1940, Title 32, provides

"§ 603.387 Reconsidering Classifications.

Upon receiving new evidence the local board may at any time before induction reconsider the classification of any registrant. If the local board places the registrant in a different classification the board shall mail a Notice of Classification (Form 57) to the registrant and shall notify the government appeal agent. If the local board refuses to reclassify, after the registrant has requested reclassification because of a change in circumstances, it shall mail a

Notice of Continuance of Classification (Form 58) to the registrant.” (Emphasis supplied.)

About three weeks before June 22nd, when he failed to report, Regulation 603.387 was significantly amended by Executive Order of May 28, 1941, 6 Fed. Reg. 2603. The portion concerning a continuing classification disappeared. Instead, the May 28th Order provided, in Regulation 385, that no classification is “permanent.” 386 gives the board the power to reopen the classification on its own motion. 387 and 387 (b) provide that in such a reclassification proceeding the classification shall be considered “anew” with the same right of appearance as at the original classification and its “determination shall be, and have the effect of, a new and original classification *even though the registrant is again placed in the class that he was in before the case was reopened.*” (Emphasis supplied.)

The bill of exceptions shows that at the conclusion of the Government’s case it offered evidence, uncontradicted in the transcript of the entire case, that such an application was entertained in a formal proceeding by the board entitled

“Proceedings Before the Local Board of
Yavapai County, June 20, 1941

Present: Alfred B. Carr, Chairman, Lauren V. Seares, Joseph W. Berg, Egbert K. Dutcher, Members, and Nellie G. Prince, Stenographer.

Order No. 217

In the Matter of the Application of

ROBERT EARL HOPPER, JR.

for Classification as a Minister of Religion, and his Application for Extension of Time within which to Appeal the Decision of the Local Board of Yavapai County.”

In that proceeding Hopper suffered from the want of counsel, denied him by the regulations, and he and the witnesses he offered made a poor showing. It well could have warranted his “being *again* placed” in IV-E “the class that he was in *before*” the application was coonsidered. While the rule gave him the right to appeal it could be argued that it would have been of no avail. Quite likely the board was not aware of the change in the regulation by the Executive Order of three weeks before and hence failed to reclassify.

That, however, is entirely outside the question whether we, in effect, shall send an innocent man to prison by affirming a wrongful conviction. The fact is that he had been unclassified and was not shown to be reclassified “again” and “anew.”

On the Government's showing, on June 22, 1941, when Hopper failed to report, he was not in any class on which a "duty" under 50 U. S. C. A. 311 could be created requiring him to respond to any board's order and hence that failure constituted no crime. The judgment should be reversed.

[Endorsed]: Opinion, Concurring Opinion, and Dissenting Opinion. Filed Dec. 6, 1943. Paul P. O'Brien, Clerk .

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10110

ROBERT EARL HOPPER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the District of Arizona

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Arizona and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judg-

ment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered Dec. 6, 1943.
Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, January 18, 1944.

Before: Wilbur, Garrecht, Denman, Mathews,
Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION
FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed January 5, 1944, and within time allowed therefor by rule of Court, for a rehearing of above cause be, and hereby is denied.

It Is Further Ordered that the issuance of the mandate of this Court in above cause be, and hereby is stayed to and including February 18, 1944, and in the event the appellant shall file with the Clerk of the Supreme Court of the United States on or before said date his petition for writ of certiorari then the mandate of this court is to be stayed until after disposition by the said Supreme Court of the United States of the petition for writ of certiorari.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred forty-one (141) pages, numbered from and including 1 to and including 141, to be a full, true and correct copy of the entire record excluding certain original exhibits of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of February, 1944.

[Seal]

PAUL P. O'BRIEN,
Clerk.

No. 10,110

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROBERT EARL HOPPER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States
for the District of Arizona.

BRIEF FOR APPELLANT.

CHARLIE W. CLARK,

1930 West Adams Street, Phoenix, Arizona,

Attorney for Appellant.

FILED

AUG 12 1942

PAUL P. O'BRIEN,

CLERK

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No. 10,110

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ROBERT EARL HOPPER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States
for the District of Arizona.

BRIEF FOR APPELLANT.

ABSTRACT OR STATEMENT OF THE CASE.

The evidence, construed as it must be, most favorably to the Government's case, shows: Robert Earl Hopper, Jr., the defendant herein, registered under Selective Service Act of 1940, being Title 50, U. S. C. Ch. 301, 311, on October 17, 1940. He was thereafter classified as I-A by the local board; however he subsequently requested a conscientious objector questionnaire and upon completion of that instrument was classified IV-E by his Board and was thereafter ordered to report for work of National Importance under Civilian Direction.

Upon receipt of the aforementioned order the defendant called upon the Selective Service Board at Prescott, Arizona (defendant lives on a farm some sixty miles from Prescott in an inaccessible cattle ranching country or community), and advised them that he had never received a notice of his classification of IV-E and then informed the Board or its Secretary that he had been erroneously classified and that he was one of Jehovah's witnesses and a Minister of the Truth, and as such he was commissioned to "preach this Gospel of The Kingdom in all the world for a Witness", and as such Minister he was entitled to the classification of Ordained Minister of Religion or, IV-D. He then made application for such classification of IV-D and the Local Board held a hearing upon this matter. (T. R. 73—Govt's Exhibit No. 14.) The Local Board never did dispose of this application and never did act upon the evidence adduced at the hearing held pursuant to such application.

The Defendant did refuse to report to any Conscientious-objector camp pending disposition of his application and any appeal to which he was entitled. (R. T. 107, lines 10-14.)

The Defendant-Appellant was subsequently arrested and this appeal follows conviction upon the charge as laid in the Indictment. (T. R. 1.)

The Appellant will present for the consideration of the Honorable Court the following propositions:

The Indictment in the instant case is fatally defective for the reasons:

(1) That said Indictment does not charge that said defendant was lawfully required by any duly constituted agency of this Government to any specific thing enjoined by the act in question, and/or that he failed and refused to do and perform any act lawfully required of said defendant under said statute, Wherefore the Indictment must fail.

(2) That the Statute (Title 50, U. S. C. Secs. 301, 311) as construed and applied is unconstitutional and void because said Statute attempts to deprive defendant of his liberty and property without due process of Law in contravention of the Fifth Amendment to the United States Constitution; that said statute attempts to subject defendant to involuntary servitude not as a punishment for crime in violation of the Thirteenth Amendment to The United States Constitution; and that said Statute attempts to delegate Governmental and Legislative powers to private individuals and non-governmental agencies.

That the Honorable trial Court erred in the admission of certain evidence;

That the Honorable trial Court erred in denying defendant's motion for a directed verdict made at the close of the Government's case, and renewed at the close of all of the evidence in the case (T. R. 10-12) which was made upon the grounds:

(1) That the Indictment is fatally defective.

(2) That the Statute upon which this action is based is unconstitutional and void because:

(a) It violates the First Amendment to The United States Constitution in that it places a penalty on religion and prohibits the free exercise of religion.

(b) It violates the Fifth Amendment to The United States Constitution in that upon its face and as construed and applied said statute deprives defendant of liberty and property without due process of law; in this that said statute attempts to delegate legislative powers and administrative powers to private individuals and private non-governmental agencies.

(c) Said Statute, as construed and applied violates the Thirteenth Amendment to The Constitution of The United States in that it subjects the defendant to involuntary servitude not as punishment for crime.

(d) That no public offense has been proved against this defendant; in this: that from all of the evidence introduced by the Government the only permissible conclusion that any impartial tribunal could have arrived at is that the Local Selective Service Board had acted arbitrarily and capriciously in classifying defendant IV-E and that such classification was void and said evidence conclusively shows that the only possible classification of defendant was IV-D.

ASSIGNMENTS OF ERROR.

No. I.

The Indictment is fatally defective because:

(a) It does not state facts sufficient to constitute a crime or public offense.

Harris v. U. S., 104 Fed. (2d) 41;

U. S. v. Britton, 107 U. S. 655;

U. S. v. Cruikshank, 92 U. S. 542;

Pettibone v. U. S., 148 U. S. 197;

Kane v. U. S., 120 Fed. (2d) 990.

(b) The statute on its face and as construed and applied is unconstitutional and void, because:

(1) It deprives defendant of his liberty and property without due process of law;

(2) It attempts to subject defendant to involuntary servitude not as punishment for crime;

(3) It attempts to delegate legislative power to private, non-governmental agencies.

(4) It restrains and prohibits the free exercise of religion.

Carter v. Carter Coal Co., 298 U. S. 238;

Rome v. Marsh, 272 Fed. 982;

Wong Wing v. U. S., 163 U. S. 228;

Bailey v. Alabama, 219 U. S. 219;

In re Brooks, 5 Fed. (2d) 238;

Ex parte Wilson, 114 U. S. 417;

Ex parte Lloyd, 13 Fed. Supp. 1005.

Nos. II to XI, incl.

These assignments raise identical questions and will, in the interests of brevity, be presented together.

The Honorable Court erred in the admission of evidence being documentary in its nature and alleged to have been signed by the defendant. No foundation was ever laid for its reception other than that it was a part of Selective Service Board Records. Certain of these exhibits purport to be signed by the defendant yet his signature was never identified nor was any proof offered that these instruments were his acts.

No. XII.

The Honorable Court erred in denying defendant's motion for a directed verdict of not guilty made at the close of the Government's case and renewed at the close of the case (T. R. 10-12), which motion was made upon the grounds:

(1) That the Indictment is fatally defective.

(2) That the Statute is unconstitutional and void because:

(a) It violates the First Amendment to The United States Constitution in that it places a penalty on religion and prohibits the free exercise of religion.

(b) It violates the Fifth Amendment to The United States Constitution in that upon its face and as construed and applied said statute deprives defendant of liberty and property without due process of law; in this, that said statute attempts to delegate legislative powers and administrative powers to private individuals and private non-governmental agencies.

(c) Said Statute, as construed and applied violates the Thirteenth Amendment to The Constitution

of The United States in that it subjects the defendant to involuntary servitude not as punishment for crime.

(d) That no public offense has been proved against this defendant; in this: that from all of the evidence introduced by the Government the only permissible conclusion that any impartial tribunal could have arrived at is that the Local Selective Service Board had acted arbitrarily and capriciously in classifying defendant IV-E and that such classification was void and said evidence conclusively shows that the only possible classification of defendant was IV-D.

ARGUMENT.

ASSIGNMENT OF ERROR No. I.

That on the 7th day of February, 1942, the defendant moved to quash the indictment upon the grounds and for the reasons that said information does not state facts sufficient to constitute a crime or offense and that the statute is unconstitutional and void in that it attempts to deprive defendant of his liberty without due process of law and attempts to subject defendant to involuntary servitude and attempts to delegate legislative authority to an executive officer, and that the Honorable Court erred in denying said motion to quash indictment, which order was rendered on the 17th day of February, 1942.

The Indictment (T. R. 1) sets forth, in part: "that Robert Earl Hopper, having theretofore registered under the Selective Training and Service Act of 1940, on or about (or about) the 22nd day of June A. D., 1941, * * * did knowingly, wilfully, unlawfully and feloniously fail and neglect to perform the duty required of him under and in the execution of said Act, and the rules and regulations made pursuant

thereto, that is to say, that the said defendant Robert Earl Hopper, having been theretofore classified by his local draft board at Prescott, Arizona, as a conscientious objector, and found fit for general service, did then and there, knowing, wilfully, unlawfully and feloniously fail and neglect to report as a conscientious objector for civilian work of national importance when notified so to do by his local draft board * * *".

The title of the administrative agency set up and established by The United States to deal with all questions arising under Selective Training and Service Act of 1940 is Yavapai County Local Board No. 1, Selective Service System. (R. T. 69, lines 11-41—Testimony Harry F. Dise.) No other agency has ever been empowered to deal with Selectees in the first instance, that is to classify such Selectees and issue valid orders respecting them. Patently some agency denominated "his local draft board" as alleged in the Indictment (T. R. 1-2) can have no jurisdiction over defendant and can issue no valid order concerning him.

The allegations of an Indictment are jurisdictional; the sufficiency of the averments therein go to the very foundation of the right of a Court to entertain the cause or to subject the defendant to any further proceedings therein.

This Indictment does not allege that defendant was ever ordered to do anything lawfully required of him by any agency lawfully constituted to so order. The words "his local draft board" mean nothing. If it was intended to charge with failure to report

upon lawful order of Yavapai County Local Board No. 1, Selective Service System that fact should be so stated as it is the basis of proof of any violation of this section of the Statute. Certainly no inconvenience to the Government could result from being required to properly state the basis of the charge in the Indictment.

The Indictment is fatally defective in that it does not state when, where, or to whom defendant was to report. From the Indictment we cannot tell whether the defendant be required to report to the Selective Service Board, the nearest Forest Ranger, or the United States Commissioner, or some other Governmental Agency. As to when he was required to report under the alleged order we are left entirely to conjecture.

An Indictment must charge each and every element of an offense.

Pettibone v. U. S., 148 U. S. 197;

Kane v. U. S., 120 Fed. (2d) 990;

Harris v. U. S., 104 Fed. (2d) 41.

Every essential element of the crime has generally been required to be charged, not merely inferentially, but with reasonable certainty and directness.

Kane v. U. S., 120 Fed. (2d) 990;

U. S. v. Hess, 124 U. S. 438, 31 L. Ed. 516.

A well considered recent case upon the question here involved is the case of *Harris v. United States*, supra. This case holds, among other things, that:

“The essential elements of a statutory offense must be set out in an Indictment”.

“Allegations of essential elements of statutory offense are matters of substance and not of form and their omission is not aided or cured by verdict”.

“The omission from an Indictment of any fact or circumstance necessary to constitute an offense will be fatal.”

“nor can any such omission be supplied by intentment or implication and the charge must be made directly and not inferentially or by way of recital.”

and on the proposition that the allegations of an Indictment are Jurisdictional:

“Where challenge to an Indictment is based upon an omission in averments thereof of an essential element of crime, objection thereto is not waived and may even be asserted on appeal for the first time.”

Harris v. U. S., supra.

Also see:

U. S. v. Britton, 107 U. S. 655;

U. S. v. Cruikshank, 92 U. S. 542;

Pettibone v. U. S., 148 U. S. 197;

Kane v. U. S., 120 Fed. (2d) 990.

We feel that the statement of bare essentials made, sufficiently states Appellant's position with reference to the substantive allegations of the Indictment and demonstrates that the alleged Indictment is a nullity.

The argument and propositions of Law directed to the balance of Assignment of Error No. I, being that portion addressed to the Unconstitutionality of

the Law will be made under Assignment of Error No. XII having to do with the denial of the Motion for Directed Verdict. We respectfully seek the Court's indulgence that we may avoid repetition.

ASSIGNMENT OF ERROR No. II.

That the Honorable Court erred in overruling defendant's objection to Government's Exhibit No. I in evidence to which defendant excepted; said Government's Exhibit No. I in evidence being a registration card alleged to have been signed by defendant and which the witness Gerald T. Bigaouette testified that he was from October 17, 1940 until December 31, 1940 the chief clerk of the local Selective Service Board and that said (28) Exhibit I was a part of his records kept under the rules and regulations of the department, the basis of defendant's objection being that Government's Exhibit No. I was not properly identified, all as more fully appears on pages 11 and 12 of the Reporter's Transcript.

ASSIGNMENT OF ERROR No. III.

That the Honorable Court erred in overruling defendant's objection to Government's Exhibit 2 in evidence, to which exception was taken, which Government's Exhibit 2 in evidence is the classification record of the United States Government kept on each individual that is registered in the county or local board, which objection was made upon the grounds that said exhibit was in no way connected with defendant, that there is no foundation laid connecting it with the defendant, and that it has never been shown that the defendant has ever registered, as appears at pages 16 and 17, Reporter's Transcript.

ASSIGNMENT OF ERROR No. IV.

That the Honorable Court erred in overruling defendant's objection to Government's Exhibit 4 in evidence, which objection was made upon the grounds that said Exhibit 4 was not properly identified and that it was in no way connected with this defendant, said Exhibit 4 being conscientious objectors' report to which ruling the defendant excepted, as appears at page 25, Reporter's Transcript.

ASSIGNMENT OF ERROR No. V.

The Honorable Court erred in overruling defendant's objection to Government's Exhibit 5 in evidence, which is a report of physical examination, which objection was made upon the grounds that said exhibit was in no way connected with the defendant, to which ruling exception was taken by defendant, as appears at pages 28 and 29, Reporter's Transcript.

ASSIGNMENT OF ERROR No. VI.

That Honorable Court erred in overruling defendant's objection to Government's Exhibit VI in evidence, which said objection being made upon the grounds that it is in (29) no way connected with this defendant and no foundation has been laid and exception duly taken to the ruling of the Court, as appears at page 30, Reporter's Transcript.

ASSIGNMENT OF ERROR No. VII.

That the Honorable Court erred in overruling defendant's objection to the admission of Government's Exhibit No. VII in evidence, which objection was made upon the grounds that it was not identified and had no bearing upon this defendant; said Government's Exhibit No. VII being special form for conscientious objectors, and the defendant having excepted to the ruling of the Court admitting said exhibit, as appears at pages 33 and 34, Reporter's Transcript.

ASSIGNMENT OF ERROR No. VIII.

That the Honorable Court erred in overruling defendant's objection to the admission of Government's Exhibit No. VIII in evidence, being a letter as more fully appears in the bill of exceptions, addressed to the defendant, which objection was made upon the grounds that said letter was not shown to have any connection with this defendant and was not properly identified, to which ruling the defendant excepted, as appears at page 36, Reporter's Transcript.

ASSIGNMENT OF ERROR No. IX.

That the Honorable Court erred in overruling defendant's objection to the admission of Government's Exhibit No. IX in evidence, being letter dated December 23, 1940, addressed to the defendant, which objection was made upon the grounds and for the reason that said exhibit has no bearing on this defendant and is not properly identified, to which ruling defendant excepted, as appears at page 28, Reporter's Transcript.

ASSIGNMENT OF ERROR No. X.

That the Honorable Court erred in overruling defendant's objection to the receipt in evidence of Government's Exhibit No. III for identification, being Government's Exhibit III in evidence, which purports to be a selective service questionnaire signed by defendant, which was admitted upon the (30) testimony of Harry F. Dise, who testified that he had been the clerk of the Yavapai County Local Board, Selective Service System, from January 1, 1941 to the present date, and that he took over the records on January 1, 1941, that had formerly been in the custody of the witness Gerald T. Bigaoutte, and that said exhibit was in the file when said witness took over and that said exhibit was a part of the permanent records kept by his office, said exhibit being objected to by the defendant upon the grounds that it was not shown that the instrument was signed by the defendant and that it was not connected up with the defendant in this case, and that it was incompetent, to which ruling defendant excepted, as appears at pages 47 and 48, Reporter's Transcript.

ASSIGNMENT OF ERROR No. XI.

That the Honorable Court erred in receiving in evidence Government's Exhibit 2-B is the remainder of the classification record of the United States kept for each individual that is registered in the county of the local board, which objection was made upon the grounds that it was in no way connected with the defendant and that it was incompetent, to which ruling defendant excepted, as appears at page 51, Reporter's Transcript.

The foregoing assignments apply to admission of evidence and all present the same proposition. The basis of the right of the Local Board Selective Service System is the act of registration and completing questionnaire and filing same with the Board. The act of registration as evidenced by Government's Exhibit One, Assignment of Error II was if made by defendant made in the presence of some officer who could testify to its authenticity, the same is true of the questionnaire Government's Exhibit III in evidence, Assignment of Error X which is required to be sworn

to and purports to have been sworn to before one Jessie Stephens, Postmaster at Camp Verde, Arizona. To admit this evidence on no authentication other than the fact that these instruments are part of the records of the Selective Service Board and to sustain such rulings is to open the door to a very dangerous practice in the admission of evidence.

ASSIGNMENT OF ERROR No. XII.

That the Honorable Court erred in denying defendant's motion for directed verdict of not guilty, which said motion was made on the 27th day of March, 1942, after the plaintiff had rested and which said motion was made upon the grounds: That the indictment is totally defective and does not charge a public offense or crime; that the statute, Sections 301 to 311, inclusive, of Title 50, United States Code, is unconstitutional and void in that it violates the First Amendment of the Constitution of the United States in that it places a penalty on religion and prohibits the free exercise of religion, in that said statute violates the Fifth Amendment to the United States Constitution in that upon its face and as construed and applied said statute deprives defendant of his liberty and (31) property without due process of law and that said act on its face and as construed and applied violates the Thirteenth Amendment to the Constitution of the United States in that it subjects defendant to involuntary servitude not as punishment for crime and upon the further ground that said statute attempts unlawfully to delegate legislative power to private non-governmental agencies, or to private individuals, and upon the further ground that said statute delegates judicial power to sentence for an unlimited term of involuntary servitude without opportunity to be heard, to a non-judicial tribunal, and upon the further ground that no public offense has been proved nor has any crime been proved against this defendant, to which ruling the defendant duly excepted, as appears at pages 82 to 86, inclusive, Reporter's Transcript.

(1) The argument addressed to the sufficiency of the Indictment is contained herein under Assignment of Error No. I and will not be repeated here.

(2) (a) The Statute places a penalty on religion and prohibits the free exercise of religion. As construed and applied by the Selective Service Board and the trial Court because the defendant has religious scruples he must be placed under the jurisdiction of Religionists who will direct his activities; he must be removed from the place of his ministry and go to a place directed by persons who are not governmental officers. He must practice his ministry under the supervision of persons having violently divergent views as to the Ministry.

(b) It violates the Fifth Amendment to The United States Constitution in that upon its face and as construed and applied said statute deprives defendant of liberty and property without due process of law; in this, that said statute attempts to delegate legislative powers and administrative powers to private individuals, and private non-governmental agencies.

The Statute does not contemplate the induction of the defendant into the armed forces of the United States. Nor is the Statute or those portions of it relating to conscientious objectors and their service drawn under the Constitutional power of Congress to raise armies. In fact the act provides that conscientious objectors who are found fit for general service shall be assigned to work of national importance "under civilian direction". The rules and regulations promulgated under the authority of the Statute provide:

"The National Service Board for religious objectors, *a voluntary unincorporated association,*

shall have complete charge and be responsible for the management of the camps to which conscientious objectors are assigned, and that said association shall defray all expenses with reference to such camp."

This regulation appears at page 2001 Federal Register for 1941, and was promulgated April 11, 1941, by the Director of Selective Service. Here we find the attempted delegation of authority to private individuals so vigorously and properly proscribed by the decision in *Carter v. Carter Coal Company*, 298 U. S. 238, 80 L. Ed. 1163, wherein the learned Justice condemned this delegation in the following language:

"The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is Legislative delegation in its most obnoxious form; for it is not even delegation to an official or official body, presumptively disinterested but to private persons whose interests may be and often are adverse to the interests of others in the same business.

"In the very nature of things one person may not be intrusted with the power to regulate the business of another and a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary and so clearly a denial of the rights safeguarded by the due process clause of the Fifth Amendment that it is unnecessary to do more than refer to decisions of this Court which foreclose the question. *A. L. A. Schechter Poultry Corp. v. U. S.* 295 U. S. 537; *Eubank v. Richmond* 226 U. S. 137, 143; *Washington v. Roberge* 278 U. S. 116."

(c) Said Statute, as construed and applied violates the Thirteenth Amendment to The Constitution of the United States in that it subjects defendant to involuntary servitude not as punishment for crime.

When the acts or omissions with which defendant is charged were done the United States of America was at peace with the nations of the World. No war powers had been invoked and even had this country been at war it has been held by The United States Supreme Court that certain amendments are not suspended in time of war.

By the Thirteenth Amendment slavery of whatever name and form and all its badges and incidents was abolished. One person could not be held to render service to another against his will. One human being cannot under our Constitution, be required to render service to another whether that person be the Government or any individual excepting penal servitude as a punishment for crime. The Statute which attempts to require Defendant to perform work "of National importance under civilian direction" is an attempt to require "involuntary servitude" and to create a class of persons required to render service against their will and for an unlimited time because of their religious principles.

We adopt as our argument the following language from *Bailey v. Alabama*, 219 U. S. 219:

"The language of the 13th Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest territory, and gave them unrestricted application within the United States and all

places subject to their jurisdiction. While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag.

“The words ‘involuntary servitude’ have a ‘larger meaning than slavery’.

“The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit, which is the essence of involuntary servitude.”

“And in this explicit and comprehensive enactment Act, March 2, 1867, Congress was not concerned with mere names or manner of description, or with a particular place or section of the country. It was concerned with a fact, wherever it might exist; with a condition, however named and wherever it might be established, maintained or enforced.

“It is the compulsion of the service that the statute inhibits, for when that occurs, the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness.”

A recent decision upon this proposition is *Petition of Brooks*, 5 Fed. (2d) 238, wherein the right to hold a person is laid down and limited. We quote from that decision:

“The right to arrest and hold or imprison an alien is nothing but a necessary incident of the

right to exclude or deport. *There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as punishment for crime.* Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclusion proceedings are not punishment for crime. Citing *Bilokumsky v. Tod*, 239 U. S. 149, 154; 44 S. Ct. 54; 68 L. Ed. 221, and numerous authorities.”

(d) That no public offense has been proved against this defendant; in this: that from all of the evidence introduced by the Government the only permissible conclusion that any impartial tribunal could have arrived at is that the Local Selective Service Board had acted arbitrarily and capriciously in classifying defendant IV-E and that such classification was void and said evidence conclusively shows that the only possible classification of defendant was IV-D.

When the Defendant made and filed his questionnaire Government's Exhibit III (T. R. 86-107), he stated therein (T. R. 99) “I am not a minister of religion—I do not customarily serve as a minister—I have been a minister of the Truth for Jehovah's Witnesses since October 39—I have been formally ordained. If so, my ordination was performed on by God at” and again (T. R. 104), “I am one of Jehovah's Witnesses and as such I am entirely neutral to the affairs of this world, based on the booklet *Neutrality*”. Further the stand of defendant is fully explained to his local board in Government's Exhibit 7. (T. R. 60.)

At the time defendant made and filed his questionnaire he could not say that he was a Minister of Religion because of the biblical admonition against religion. Defendant is a Minister within the fullest meaning of the term but he must follow the teachings of the Holy Bible and shun religion. He must be a true follower of Jesus Christ and preach the Truth as set forth in the Holy Bible.

“And for all their works they do for to be seen of men. For they make their phylacteries broad, and enlarge their fringes.

“And they love the first places at feasts, and the first chairs in the synagogues,

“And salutations in the market place, and to be called by men, Rabbi,

“But be not you called Rabbi. For one is your master; and all you are brethren.

“And call none your Father upon earth; for one is your father, who is in heaven.

“Neither be ye called masters; for one is your master, Christ.

“He that is the greatest among you shall be your servant.

“And whosoever shall exalt himself shall be humbled; and he that shall humble himself shall be exalted.

“But woe to you scribes and Pharisees, hypocrites; because you shut the kingdom of heaven against men, for you yourselves do not enter in; and those that are going in, you suffer not to enter.

“Woe to you scribes and Pharisees, hypocrites; because you devour the houses of widows, praying long prayers. For this you shall receive the greater judgment.”

St. Matthew, Ch. 23, V. 5-15.

He does, however, fully state the nature of his ministry and the facts stated and not his conclusions are the relevant portion of the statements.

That Jehovah's witnesses are entitled to the classification of IV-D, Minister of Religion is made plain and any doubts concerning their status set at rest is evidenced by Vol. III, Opinion No. 14, National Headquarters Selective Service System, promulgated by Lewis B. Hershey, Deputy Director, June 12, 1941 construing Sec. 5 (d), Par. 360, S. S. R. We quote in part:

“Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based on whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other Jehovah's witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.”

The act provides that the Board upon investigation to determine the applicant's true classification shall take evidence and shall place the same in its file in

order that the legality of the board's action may be determined. All of the evidence received by the Board, and upon which, of necessity, they predicated their classification is before the Court. And from all of this evidence it will appear that the action of the Local Board was arbitrary and capricious and that the Court should have directed a verdict of not guilty.

The duty of administrative boards in these matters is stated in *Rome v. Marsh*, 272 Fed. 982:

“Administrative boards are not simply courts hearing cases between party and party; it is their duty to see that the individual citizen receives his rights, as well as that the government receives its proper due.”

also, *U. S. v. Baird*, 39 Fed. Supp. 388, 391:

“These cases undoubtedly settle the question that the determination of the local boards are final unless the selectee's rights were invaded. It is not the province of this court to review the evidence before the local board but only to review the case record to determine whether or not there was sufficient evidence before the board to substantiate its findings.”

and, *U. S. v. Baird*, 39 Fed. Supp. 411, 413:

“The law appears to be settled that the action of local boards within the scope of their authority is final and not subject to judicial review *unless the board has acted contrary to law or has manifestly abused the discretion committed to them by statute.*”

And if the Court should disregard all else, the Government's evidence (Government's Exhibit XIV,

T. R. 73) conclusively shows that defendant was arrested, tried and sentenced while he had an application pending for change in classification; this is evidenced by the Local Board's own stenographic report of proceedings. (Ex. XIV.)

It follows that the Court should have directed the verdict and left the defendant where it found him subject under the Law to the further orders of his Local Board.

We respectfully submit that the Judgment of the District Court should be reversed.

Dated, Phoenix, Arizona,
August 12, 1942.

CHARLIE W. CLARK,
Attorney for Appellant.

No. 10110

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

ROBERT EARL HOPPER,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States
for the District of Arizona

Brief For The Appellee

FILED

SEP 11 1942

PAUL P. O'BRIEN,

CLERK

FRANK E. FLYNN,
*United States Attorney,
District of Arizona*

E. R. THURMAN,
Assistant U. S. Attorney

Attorneys for Appellee.



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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

ROBERT EARL HOPPER,
Appellant,
v.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States
for the District of Arizona

Brief For The Appellee

STATEMENT OF THE CASE

An indictment was returned on December 12, 1941, charging the appellant with failure to perform the duty required of him under the Selective Training and Service Act of 1940 (50 U.S.C. 311), in that he failed to report as a conscientious objector for civilian work of national importance when required so to do by his local draft board (T.R. 2).

A motion to quash the indictment was denied February 17, 1942 (T.R. 6).

The case was tried to a jury and on March 28, 1942, the appellant was found guilty as charged (T.R. 13). Notice of appeal was filed April 6, 1942 (T.R. 14, 16).

QUESTIONS PRESENTED

1. Whether the indictment is defective.
2. Whether the Court erred in the admission of certain evidence.
3. Whether the Selective Training and Service Act of 1940 is unconstitutional.

There is no question as to the sufficiency of the evidence, and no such question can be raised for the reason that all of the evidence is not included in the record of the appeal.

The statement of the case in Appellant's Brief shows facts sufficient to support the verdict (App. B. 1-2).

When appellant registered under the Selective Service Act he was classified by the Local Board as IV-E, and thereafter ordered to report for work of national importance under civilian direction (App. B. 1). Appellant refused to report (App. B. 2).

SUMMARY OF ARGUMENT

In answering appellant's argument we will discuss the points raised in the order in which they are taken up in Appellant's Brief.

ASSIGNMENT OF ERROR NO. 1

This assignment has to do with the sufficiency of the indictment. That an indictment must charge each and every element of an offense is a well established principle of law. The authorities cited by appellant (App. B. 9) merely reaffirm this principle.

In *Harris v. United States*, 104 Fed. 2d 41, cited by Appellant, the indictment was not in the wording of the statute and failed to allege an important element of the offense, namely, that the false entry was made in any record which defendant was required to keep in connection with his official duties.

In *United States v. Britton*, 107 U.S. 655 (App. B. 10), the indictment failed to plead an exception stated in the enacting clause of the statute. No such question is raised in the present case.

The other cases cited by appellant on this point state correct principles of law but are not helpful in the application of the law to the present case. The indictment in question contains allegations of all the elements of the crime. It alleges that appellant registered under the Selective Service Act, that he was classified by the Board as a conscientious objector, and was found fit for general service. The offense charged is that he failed to perform a duty required of him, namely, to report for civilian work of national importance when notified so to do.

50 U.S.C. 311.

This offense is directly alleged in the indictment (T.R. 1-2).

The indictment was sufficient under the provisions of Title 18 U.S.C. Section 556, and the authorities cited in the note. It fully informs the appellant of the nature of the charge so as to enable him to prepare his defense. It was also sufficiently definite to support a plea of former acquittal or conviction against another charge for the same offense.

Moore v. U.S., 128 Fed. 2d 974.

Zuziak v. U.S., 119 Fed. 2d 140 (9 Cir.).

Graham v. U.S., 120 Fed. 2d 543.

In the 9th Circuit case just cited the accused was charged with failure to present himself for and submit to registration and selective compulsory military training as in the Act provided. The indictment did not designate the place where he failed to present himself nor are the regulations referred to. The indictment was upheld by this Court.

We will follow appellant's example and discuss the question of the unconstitutionality of the law under Assignment of Error No. XII, which is based on the motion for a directed verdict.

ASSIGNMENTS OF ERROR NOS. II TO XI, INCLUSIVE (T.R. 25-30)

These assignments have to do with the appellant's objections to the admission in evidence of Government's Exhibits 1 to 9, inclusive.

Assignment of Error No. II (T.R. 26):

This assignment refers to Government's Exhibit No. 1, which is a registration card and one of the records required to be kept by the Local Selective Service Board (T.R. 36). There is no dispute or question in

this case as to appellant's registration. The only objection made to this exhibit was that it was not properly identified (T.R. 37). The witness Bigaouette, who was clerk of the Board, sufficiently identified the exhibit (T.R. 36-37).

Assignment of Error No. III (T.R. 27):

Government's Exhibit No. 2 is a classification record covering the appellant (T.R. 41). All entries in this exhibit were made by the witness Bigaouette (T.R. 42) or the witness Dise (T.R. 110-111) while each was clerk of the Local Board.

Assignment of Error No. IV (T.R. 27):

Government's Exhibit No. 4 (T.R. 47) is a public document, being a record in the Selective Service office showing the classification of IV-E, this record to be made in quadruplicate when a registrant has been placed in Class IV-E (T.R. 48), and is to be mailed to registrant five days prior to the time when the registrant must report for assignment to camp (T.R. 49). This was done (T.R. 49) and an entry to that effect made in column 16 of Government's Exhibit No. 2 (T.R. 40).

Assignment of Error No. V (T.R. 28):

Government's Exhibit No. 5 (T.R. 52-57) was a form sent to appellant with Exhibit No. 4 and also sent to the examining physician, and when returned to the office was kept as a part of the record (T.R. 51) and is the basis for appellant's classification (T.R. 51). The signature of the chairman of the Board was placed on this instrument after it was returned to the Board (T.R. 51). There is nothing in the exhibit prejudicial to appellant. It is merely one of the steps in his classification. We can find no objection in the record to Ex-

hibit No. 5, although counsel took an exception after its admission (T.R. 58).

Assignment of Error No. VI (T.R. 28):

Government's Exhibit No. 6 (T.R. 58-59) is merely a blank form of the notice mailed to appellant on December 12, 1940 (T.R. 59). It was introduced for the purpose of showing the form used. The original, having been mailed, was presumably in the possession of appellant and necessarily not available to the Government.

Assignment of Error No. VII (T.R. 28):

Government's Exhibit No. 7 (T.R. 60) is a letter asking for blanks for conscientious objectors. Appellant, in his brief at page 12, erroneously describes Exhibit No. 7 as a conscientious objector's form. This letter contains nothing that could be prejudicial to appellant and purports to be a request from him; but whether it was or not, it was the basis for the action of the Board in mailing to appellant Government's Exhibit No. 8 (T.R. 71).

Assignment of Error No. VIII (T.R. 29):

Government's Exhibit No. 8 (T.R. 71) was admitted in evidence without any objection (T.R. 71-72), although an exception was taken after its introduction.

Assignment of Error No. IX (T.R. 29):

Government's Exhibit No. 9 (T.R. 72) is a carbon copy of a letter identified by the witness Bigaouette, who testified he signed the original and enclosed it with Exhibit No. 8 (T.R. 73). It was clearly admissible as evidence of the action of the Board.

Assignment of Error No. X (T.R. 29):

Government's Exhibit No. 3 (T.R. 86-107) is a Selective Service questionnaire identified by the witness Bigaouette as having been mailed to the appellant (T.R. 45-46), and received back in the office. This exhibit was further identified by the witness Dise as being part of the record taken over by him when he succeeded Bigaouette as clerk (T.R. 107). Dise further identified the entry of January 3, 1941 (T.R. 107), as having been made by the chairman of the Board (T.R. 108), and the entry of December 7, 1941 (T.R. 107), as having been made by a member of the Board (T.R. 108). This exhibit was a public record and admitted in evidence to show one of the steps in the registration of appellant, and was properly admissible for that purpose.

Howenstine v. U.S., 263 Fed. 1-6.

Assignment of Error No. XI (T.R. 30):

Government's Exhibit No. 2-B is that part of Government's Exhibit No. 2 (T.R. 40) for Identification not included in the evidence as Government's Exhibit No. 2-A (T.R. 109), and is the remainder of the classification record which was identified by the witnesses Bigaouette and Dise, the entries designated as 2-B being made by the witness Dise (T.R. 110-111).

All of the exhibits discussed in Assignments of Error Nos. II to XI were public records and constitute a history of the proceedings before the Local Board. In view of the statement in Appellant's Brief, pages 1-2, there is no question in this case as to the sufficiency of the evidence. Appellant was registered, qualified and notified to report for work of national importance. He refused to report (App. B. 2). Under those circum-

stances there is nothing in the exhibits introduced in evidence prejudicial to the appellant. The documents were admitted as public records and were identified by the persons in charge of the office.

Howenstine v. U.S., 263 Fed. 1-6-7 (9 Circuit).
Johnson v. U.S., 126 Fed. 2d 242-246.

ASSIGNMENT OF ERROR NO. XII (T.R. 30)

This assignment is based upon appellant's motion for a directed verdict. The sufficiency of the indictment and the constitutionality of the Selective Service Act are attacked. The question of the sufficiency of the indictment is discussed under Assignment of Error No. I.

Appellant attacks the constitutionality of the Act on several grounds:

1. That it prohibits the free exercise of religion;
2. That it would deprive appellant of liberty and property without due process of law in that it is a delegation of legislative powers;
3. That it relegates appellant to involuntary servitude not as punishment for crime; and
4. That the Board acted arbitrarily and capriciously in classifying appellant.

There is no merit in any of the foregoing contentions.

herling United States v. Herling, et al.,
120 Fed. 2d 236.

Selective Draft Law Cases, 245 U.S. 366.

Goldman v. U.S., 245 U.S. 474.

O'Connell v. U.S., 253 U.S. 142.

United States v. Stephens, 245 Fed. 956.

The cited cases discuss all the points raised by appellant and dispose of them contrary to the position taken by appellant. I shall quote but from one of the cases cited.

“The power of Congress to raise armies, like the power to declare war, is unconditional, unqualified and absolute; and Congress is the exclusive judge of the necessity for the exercise of the power and of the means and manner prescribed by it for its exercise.”

United States v. Stephens, *supra*.

It seems to me that unless we accept this statement as correct, then is our nation built not upon the enduring rock but upon the sands, to be washed away by the first wave of opposition from within or from without, and our great democratic institutions are but houses of cards to be blown away by the first zephyr of dissension or dissatisfaction.

In support of the right of conscription, more properly called Selective Service, we give the following reference to Scripture, so strongly relied upon by appellant:

Num., Chapter 1, Verses 2-3.
Num., Chapter 31, Verses 3-6.

Exemptions:

Deut., Chapter 20, Verses 5-7.

The question in the fourth ground above stated is found in Appellant's Brief, page 19, paragraph (d).

The appellant did not exhaust his remedies provided by the Act. He claims the Board acted arbitrarily

and capriciously in classifying him IV-E. He took no appeal from the classification by the Board.

“* * * a registrant cannot come to a court for such relief until he has exhausted all available and sufficient administrative remedies for such arbitrary action.”

Johnson v. U.S., 126 Fed. 2d. 242-246.

United States v. DiLorenzo, 45 F. Supp. 590.

Fletcher v. U.S., 129 Fed. 2d 262.

Rase v. U.S., 129 Fed. 2d 204.

SUMMARY

The indictment was sufficiently definite to inform appellant of the nature of the charge and to support a plea of former jeopardy.

The constitutionality of the Act of Congress which appellant is charged with violating has been upheld by all of the authorities.

Appellant's Brief admits proof of facts sufficient to establish all elements of the crime.

Appellant had a fair and impartial trial, and the verdict and judgment should be affirmed.

Respectfully submitted,

FRANK E. FLYNN,
*United States Attorney,
District of Arizona.*

E. R. THURMAN,
Assistant U. S. Attorney.
Attorneys for Appellee.

No. 10110

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

ROBERT EARL HOPPER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S PETITION FOR A REHEARING
AND
APPLICATION FOR STAY OF ISSUANCE OF MANDATE

FILED

JAN 18 1943

PAUL P. O'BRIEN,
CLERK

FRANK E. FLYNN,
United States Attorney,
District of Arizona,

E. R. THURMAN,
Assistant U. S. Attorney,

Attorneys for Appellee.



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IN THE
United States
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For the Ninth Circuit

ROBERT EARL HOPPER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**APPELLEE'S PETITION FOR A REHEARING
AND
APPLICATION FOR STAY OF ISSUANCE OF MANDATE**

TO THE HONORABLE WILLIAM DENMAN,
CLIFTON MATHEWS, AND ALBERT LEE
STEPHENS, ASSOCIATE JUDGES OF THE
CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT:

The appellee herein, the United States of America, respectfully petitions this Honorable Court for a rehearing of this cause upon the following ground:

I.

The Court erred in holding that the indictment in this cause should have been quashed.

ARGUMENT

The Court states in its opinion that the indictment charges only that appellant registered and was classified by the board as a conscientious objector found fit for general service. The Court then concludes that the appellant would be in what the Court calls "class (b)". What the Court refers to in its opinion as class (b) is class 1-A-0 under the Selective Service Act. We respectfully submit that the Court is in error in this conclusion.

The words "found fit for general service" in the Selective Service Act and the Regulations, and as used in the indictment, have reference only to the physical condition of a registrant. They have no meaning at all with reference to military service or work of national importance under civilian direction. This is clear from a review of the Selective Service Regulations.

The words "general service" are used in the Regulations in connection with the words "limited service". The Regulations originally provided that certain registrants should be placed in 1-A if they were found fit "for *general* military service according to the standards prescribed in Volume Six, Physical Standards." (See Para. 342 of First Edition of Selective Service Regulations.) The Regulations originally provided that certain registrants should be placed in 1-B if they were found fit "for *limited* military service" according to the same physical standards. (See Para. 343 of the First Edition of the Selective Service Regulations.) Amendment No. 72, effective June 13, 1941, to Para. 365 of the Regulations provided that certain registrants should be placed in Class IV-E if, after physical examination, they are found "fit for general military service," and in Class IV-E (limited service) if, after

physical examination, they are found "fit only for limited military service." (See Fed. Reg. Vol. 6, p. 2908.)

Amendment No. 102 revised Paragraph 364 as previously revised by Amendment No. 72. (See Fed. Reg. Vol. 6, p. 4252, Aug. 21, 1941.) As amended, Paragraph 365 provided that in Class IV-E should be placed certain registrants found to be "fit for general service" and in Class IV-E-LS should be placed certain registrants found to be "fit only for limited service."

The allegation in the indictment, that the appellant was classified as a conscientious objector and found fit for general service, would, standing by itself, place him in either a I-A-0 classification or a IV-E classification. Any uncertainty that might arise by reason of this allegation is removed by the allegation in the indictment that the appellant *was ordered to report as a conscientious objector for civilian work of national importance*. The foregoing allegations clearly place appellant in Class IV-E. The phrase "conscientious objector" is the usual, common manner of referring to one placed in Class IV-E. Nowhere in the record has the appellant claimed there was any uncertainty in this indictment as to the classification of appellant. Had the appellant claimed any uncertainty, it could have been corrected by a bill of particulars.

Since it is alleged in the indictment that the appellant is charged with the duty of reporting for work of national importance when notified so to do, it is not fatal that the indictment does not specify in detail the classification of the appellant, his age and residence, and the absence of factors which would exempt him from the operation of the Act. The allegation in the indictment, charging appellant with failure to perform

that duty and failure to report for work of national importance as required of him under the Act, necessarily includes the charge that he is within the proper age group, that he is not exempt because of citizenship, and that he was classified in IV-E. There is a presumption that a public officer has properly performed his duties. When the board ordered appellant to report for work of national importance, there was a presumption that they had authority and jurisdiction to so order. The allegation of the ultimate fact was all that was necessary.

The authorities are practically unanimous in holding that one must obey an order of the board, and the question of the legality of such order cannot be raised in a prosecution for failure to obey. The only method of determining the legality of one's detention for failure to obey such an order is by habeas corpus. In other words, the facts, which the opinion in this case say must be alleged in the indictment, are purely defensive matters which are controverted by the allegations in the indictment in this case. *Ex parte Stewart*, 47 Fed. Sup. 415, and authorities therein cited, and authorities cited in Appellee's Brief.

The general rule is that if the language of a statute is sufficient to apprise the accused, with reasonable certainty, of the nature of the accusation against him, an indictment drawn in that language is sufficient. See *United States v. Henderson* (C.C.A.D.C., 1941) 121 F. (2d) 75; *Potter v. United States*, 155 U.S. 438; *Summers v. United States*, (C.C.A. 4, 1926) 11 F. (2d) 583, certiorari denied 271 U.S. 681. The indictment in this case follows the language of the statute.

This indictment fairly informs the accused of the charge which he is required to meet and is sufficiently

specific to avoid the danger of his again being prosecuted for the same offense. Consequently, it should not be held insufficient. See *Hewitt v. United States*, (C.C.A. 8, 1940) 110 F. (2d) 1, 6; *Hagner v. United States*, 285 U.S. 427, 431; *Beard v. United States*, (App. D.C.) 82 F. (2d) 837, 840; (and authorities cited Appellee's Brief).

The foregoing conclusions are positively indicated by the fact that the appellant never, at any stage of the proceedings, raised any of the questions upon which this Court reversed the judgment. We urge a rehearing in this case for the very good reason that the Government has never had the opportunity to present its views on these questions. In the record in the trial court, in the briefs on appeal, and in the argument before this Court, there is not one word of discussion on the points which were first raised and sustained by the opinion in this case.

We have not attempted in this petition to exhaust either the authorities or the argument in support of the Government's theory. We should like the opportunity of presenting our position fully at a rehearing.

Respectfully submitted,

FRANK E. FLYNN,
United States Attorney,
District of Arizona.

E. R. THURMAN,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 10110

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

ROBERT EARL HOPPER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPLICATION FOR STAY OF ISSUANCE OF MANDATE

TO THE HONORABLE WILLIAM DENMAN,
CLIFTON MATHEWS, AND ALBERT LEE
STEPHENS, ASSOCIATE JUDGES OF THE
CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT:

In the event that this petition for rehearing should be denied, it is the purpose and desire of appellee to apply to the Supreme Court of the United States for issuance of a Writ of Certiorari, and for that reason application is hereby made for a stay of the issuance

of mandate of this Honorable Court pending the presentation and determination of such petition for Writ of Certiorari.

DATED at Phoenix, Arizona, this 12 day of January, 1943.

Respectfully submitted,

FRANK E. FLYNN,
United States Attorney,
District of Arizona.

E. R. THURMAN,
Assistant U. S. Attorney,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I, FRANK E. FLYNN, United States Attorney for the District of Arizona and attorney for appellee, do certify that in my opinion the foregoing Petition for Rehearing is well founded and meritorious and that neither said Petition nor said Application for Stay of Issuance of Mandate are interposed for the purpose of delay.

DATED at Phoenix, Arizona, this 12 day of January, 1943.

FRANK E. FLYNN,
United States Attorney,
District of Arizona.
Attorney for Appellee.

No. 10110

IN THE 9
United States
Circuit Court of Appeals
For the Ninth Circuit

ROBERT EARL HOPPER,
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VS.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING
AND
APPLICATION FOR STAY OF MANDATE

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

ROBERT EARL HOPPER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING
AND
APPLICATION FOR STAY OF MANDATE

TO HON. CURTIS D. WILBUR, FRANCIS D. GARRECHT, WILLIAM DENMAN, CLIFTON MATHEWS, ALBERT LEE STEPHENS, AND WILLIAM HEALY, ASSOCIATE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

The appellant herein, Robert Earl Hopper, respectfully petitions this Honorable Court for a rehearing of this cause upon the following grounds, apparent on the face of the majority opinion filed herein on December 6, 1943:

I

The Court erred in holding, in the face of convincing evidence to the contrary, that the hearing held before the local draft board of Yavapai County, Arizona, on June 20, 1941, at Prescott, Arizona (TR 10-73-85), was not a proceeding for reclassification under the regulations, (footnote No. 4, p. 3, of Opinion).

II

The court erred in holding, in the face of the record, that “appellant *has at no time* contended that this hearing effected a vacation or suspension of his existing classification”, as the record is definitely to the contrary, (footnote No. 4, p. 3, Majority Opinion). (Our emphasis.) (See Appellant’s Opening Brief, filed August 12, 1942, pp. 21-23.)

III

The Court erred in holding, in effect, that the hearing before the draft board of Yavapai County, Arizona, on June 20, 1941, above referred to, did not result in suspending or nullifying appellant’s prior classification as Class IV-E.

IV

The Court erred in affirming the judgment of conviction of the District Court of the District of Arizona, upon the grounds above and hereinafter stated.

ARGUMENT

We think the error assigned under this heading that the hearing before the local draft board on June 20, 1941, was not a proceeding for classification, is vividly shown by a mere reference to the record of the hearing

before the local draft board, as it appears on pp. 73-85 of the Transcript of Record. The majority opinion, in footnote 4, p. 3, asserting that "there is no reason for cataloging this inquiry as a proceeding for reclassification under the regulations, and it is abundantly clear that the board did not so regard it", is effectively overthrown by the record as to how the draft board itself did regard this hearing. In the first place, as mentioned on p. 73 of the Transcript of Record, the board, acting for and in behalf of the government, designated the proceedings of June 20, 1941, as:

"Proceedings before the Local Board of Yavapai County, June 20, 1941.

Present: Alfred B. Carr, Chairman, Lauren V. Sears, Joseph W. Berg, Egbert K. Dutcher, Members, and Nellie G. Prince, Stenographer.

Order No. 217

In the Matter of the Application of

ROBERT EARL HOPPER, JR., for classification as a Minister of Religion, and his application for Extension of Time within which to Appeal the Decision of the Local Board of Yavapai County."

The board, therefore, in its own language and pursuant to its own judgment, designated the proceedings as "The Application of Robert Earl Hopper, Jr. for Classification as a Minister of Religion." Surely the board knew what it was doing and how to designate it, to wit: As a proceeding for reclassification. Appellant was not then classified as a minister. It is equally certain that the regulations in effect at that time required that if a hearing for reclassification was held to "determine the classification of the registrant," the classification of the registrant must be determined, and that *"such determination shall be, and have the effect of, a*

new and original classification, even though the registrant is again placed in the class that he was before the case was re-opened." (Our italics). See Amendment No. 60, "amending the regulations so as to clarify the provisions providing for local boards' consideration of whether the classification of a registrant should be changed."

Federal Register, Vol. 6, No. 104, p. 2603, with particular reference to Sec. XXX as amended, par. 385 a, 387 b and c, and 388.

This regulation is quoted from and commented upon by Judge Denman in his dissenting opinion. It became effective ten days after its promulgation on May 26, 1941, and was therefore the controlling regulation on the date of said hearing.

Not only did the board itself consider this as a hearing for reclassification, but it went on through pp. 74 to 85 inclusive; swearing and examining witnesses, etc., with the same formality as though it were a court of record. To say that "such a proceeding furnishes no reason for regarding it as one for reclassification" is flatly refuted by the record.

It is clear, then, that the board positively and deliberately regarded its action of June 20, 1941, "as a proceeding for reclassification under the regulations." It is equally clear that appellant has specifically contended that the hearing effected a vacation or suspension of his existing classification. These are important matters and go to the very heart of the case. We shall presently submit more upon this point. The majority opinion, moreover, in speaking of the occasion when the defendant appeared before the board for this hearing, states that "the members thereof interrogated him, *apparently for the purpose of satisfying*

themselves whether there was any ground for considering his claim to be a minister, and to determine his good faith or lack of it." (Italics ours). If that statement does not stamp the proceeding before the board as one based on an application for reclassification, we must acknowledge our inability to give it any meaning whatever.

Moreover, this Exhibit XIV was treated throughout all the proceedings herein as a substantial feature of the government's case. The testimony of witnesses before the draft board has been referred to and relied upon by the government, to serve its own ends, but it seems now to contend that, in such respects as it may serve the interests of the appellant, it has no existence.

There was nothing before this hearing, and nothing considered by it, save the question of appellant's classification. It was either a "proceeding for reclassification" or it was nothing. And the government, having so paternally sponsored and fostered it, can now hardly be heard to say, or prompt the court to say, that it was nothing.

As Judge Denham points out in his dissent, the appellant and his witnesses, throughout this hearing, not being or permitted to be represented by counsel, were at a disadvantage. On the other hand, A. B. Carr, who presided at the hearing, was not only an able lawyer, but, as we believe, has been admitted to practice in this court, of which, of course, judicial notice will be taken. Had this "proceeding" not been for reclassification, he would not have given it that significant title.

II

The majority opinion further says that "appellant has at no time contended that the hearing effected a

vacation or suspension of his existing classification.” This statement, we believe, is an inadvertence only because for the moment some unanswerable evidence to the contrary escaped the Court’s attention. It appears on page 97 of the Reporter’s Transcript that the testimony of the defendant relating to his transmission to the draft board of his conscientious objection papers, was as follows:

Q. “After you filled them out, did you ever get a notice of a change in classification?” (From I-A).

A. “Never did.”

Q. “Did you ever get any further notice from them at all?”

A. “No, not until June, when they said to ‘Report to camp.’ That is the first I knew of it.”
(This order was dated June 11, and he received it June 14). (TR 81, line 11).

Q. “Then did you go in to see the local board?” (RT p. 98.)

A. “I did.”

Q. “Who did you there contact?”

A. “I contacted Mr. Dise.” (Secretary of the Board.)

Q. “*Did you then request a different classification from that which you had been given?*” (Our italics).

A. “I did. Went in for the purpose of appealing my case.”

Q. “And what classification was that?”

A. “IV E.”

(The notice to go to camp was the first notice he had of classification as IV E. (RT p. 70).

Q. “And you said—was the notice to appear to go to camp the first notice you had of your classification as IV E?”

A. "Yes sir, with the exception of a blank I received from the Citizens Religious Organization which I didn't know anything about at that time, *not having received any classification.*" (Italics ours).

Q. "Now then, you went in to Prescott to see Mr. Dise; see the board, is that right?"

A. "That is right, after I received the notice."

Further on this point, and referring to pp. 22-23 of Appellant's Opening Brief, filed August 12, 1942, with the Clerk of this Court, we find the following:

"And if the Court should disregard all else, the government's evidence (Govt. Exhibit XIV, TR 73) conclusively shows that defendant was arrested, tried, and sentenced *while he had an application pending for change in classification*; this is evidenced by the local board's own stenographic report of proceedings. (Exhibit XIV)". (Italics ours).

Quoting further, from page 2 of the same brief, we find the following.

"Upon receipt of the aforementioned order" (the order to report for work of national importance, etc.) "the defendant called upon the selective service board at Prescott, Arizona" (defendant lives on a farm some sixty miles from Prescott in an inaccessible cattle ranch country or community) "and advised them *that he had never received a notice of his classification of IV E*, and then informed the board or its secretary, *that he had been erroneously classified and that he was one of Jehovah's Witnesses and a Minister of the Truth*, and as such he was commissioned 'to preach this gospel of the Kingdom in all the world for a Witness' and as such minister he was entitled to

the classification of ordained minister of religion, or IV D. *He then made application for such classification of IV D and the local board held a hearing upon this matter. (TR 73, Government's Exhibit XIV). The local board never did dispose of this application and never did act upon the evidence adduced at the hearing of said application.*" (Italics ours).

III

From the foregoing discussion it is plainly established that the hearing before the local board at Prescott on June 20, 1941, was in every sense "a proceeding for reclassification," and under Amendment 60 of the regulations above referred to, it resulted in a cancellation of appellant's existing classification and left him as he is today, free from any classification whatsoever. It is the undisputed law of the land.

Some stress is laid in the opinion on the fact that inasmuch as appellant had admitted receiving all other notices mailed to him by the draft board, it is strongly implied that in all probability he also seasonably received the notice classifying him IV E. We think the opposite conclusion has more support in reason and justice. If he had been faithful in responding to all the other notices and orders he had received, and this is not only not questioned, but advanced by the government, we think it all the more probable that, had he received the notice of his IV E classification, it obviously being of great importance to him, he would have instantly responded by appearing before the board. In other words, the circumstances above mentioned lend far greater support to the testimony of the appellant that he had not received the notification than to the theory of the majority opinion, that he was misrepresenting the facts in denying such re-

ceipt. For that matter, we do not find anywhere in the record that appellant disregarded the advice of the company servant and the notice he had received from a Quaker organization concerning his prospective service in the civilian camp. What we do find is, that because he had not received any notice from his draft board of his IV E classification, or of any classification other than 1-A, he believed it to be right and proper that he should await such notice before taking any action; manifestly a prudent course.

Further, the majority opinion (p. 3) contains this rather caustic suggestion:

“From his story the board was warranted in believing not only that he was trifling with the truth when he denied knowledge of his IV E classification, but that his present claim to exemption as a minister was a mere pretense.”

We think the facts above stated present a sufficient refutation of this disparaging remark.

Also, it was shown not only by the testimony of the defendant, but that of Edward F. Bucey, a witness for him (RT p. 113) that he had been out with the defendant many times carrying the gospel message to people with Mr. Hopper; also that it was his duty as a company servant to issue identification cards to various ministers. He was asked if he issued one to Robert Hopper, and his answer was that he did, stating that it was identical with defendant's Exhibit C for identification, and that it is the regular witness testimony card for Jehovah's Witnesses.

This witness also stated that he actually had occasion to observe defendant in preaching the gospel from some time in February, 1940 (RT p. 114), when he came

from California and became associated with the company, until the last of June, 1940, when he left there. He was asked whether at that time the defendant regularly preached the gospel, and he answered, "Every Sunday."

His mother, Mrs. Fern Hopper, (RT p. 115) was asked if she had occasion to observe her son in the service of preaching the gospel. She answered, "Yes I have. Ever since he has been in Camp Verde he has preached the gospel, since February, 1940, two years," and when asked if he was still engaged in so preaching, she answered, "Very much so." All this does not indicate that his claim of being a minister is a "pretense."

Incidentally, his mother offered convincing evidence that her son had never received any notification of his classification under the Selective Service Act (RT p. 117). She said that she could swear positively he never did, and when asked "How do you know it never arrived?", she said, "Because I watched the mail and looked for it and expected it, and it never came." When asked who got the mail every day, she said, "I got it every day at that time; that is, I picked up the sack and distributed the mail." Further, on page 120, the witness was asked whether or not she was watching the mail to see what ruling the board had made, and whether this went on up until June, and she said, "I watched all the time, and Bob and I talked and wondered why it didn't come in."

In the testimony of William Robert Dingman, as appears on pages TR 74 to 77 inclusive, he testified that he was a company servant of Prescott Company of Jehovah's Witnesses. He stated that he had received, early in the year 1941, advice from the General

Counsel of Jehovah's Witnesses that it had been ruled between said General Counsel and the entire Executive Staff of the Selective Service at Washington, that Jehovah's Witnesses possessing the credentials of ordination and serving as ministers of religion for Jehovah's Witnesses were entitled to exemption as regular or ordained ministers, or as IV D. The defendant, he said, had stated to him at Camp Verde about the last of May, 1941, that his classification was 1 A; that he had registered in his original papers as a conscientious objector and had never received his conscientious objector blanks until he went after them; that as soon as he did obtain them, he had a discussion with the draft board, and since then he had not heard a thing; that this was in the latter part of May or the first of June, 1941. He was then asked by the chairman of the draft board (TR p. 77) :

Q. "He stated that he had not received the papers in which he claimed to be a conscientious objector?"

A. "*Oh no. He stated he had not received any further classification.*" (Our italics).

At this point we wish to notice the remarks found on page 8 of the majority opinion, as follows:

"Congress and the Selective Service alike have been considerate in their treatment of those possessing scruples against participation in war. Surely it is not expecting too much to require of them that they do civilian work of national importance at a time when their brothers, under the same compulsion, are giving their lives for them and for the nation."

It is plain that the appellant in this case did not think it was expecting too much of him that he do civilian work of national importance during the war.

As a matter of fact, he had been for five years (TR 93) and was then engaged in that work, as vitally important to the nation as any occupation could be, to wit, that of farming and raising cattle. He is competent at his work; he has been notably successful as manager of the ranch upon which he is and has been employed. It is not unreasonable to believe that this work, at his home ranch, has resulted in a much greater contribution to the war effort than could possibly have resulted under different circumstances, under new and strange directives, wherein it would be long, if ever, ere he could approximate the same efficiency that has marked his work on the home ranch.

IV

From the foregoing discussion it is established that the appellant was arrested, tried, convicted, and sentenced while he was wholly free from any classification whatsoever under Selective Service regulations as they existed prior to or on and after the date appellant was ordered to report to camp for service.

Amendment to Regulation 60, Federal Register Vol. 6, No. 104, p. 2603, pars. 385, 387b, and 388.

Therefore, no public offense under these regulations could possibly have been legally charged against him, or of which he could have been legally convicted.

Nor is there any sound reason to believe that, had the draft board been fair and considerate enough to dispose of the matter of appellant's application for reclassification after the hearing, he would not have reported to the designated camp. He believed not only that his classification was suspended, but that he had made an appeal which he thought was pending, (RT 76, et seq.). Evidently he did not realize the distinction

between an appeal and a request for reclassification. He had no counsel then.

Further, if the draft board had decided his classification adversely and had notified appellant thereof, he would then have had a valid appeal. Instead, the board instituted this prosecution. The entire proceeding subsequent to the hearing was misleading and unfair so far as the draft board is involved.

It is urged in the concurring opinion of Judge Mathews, touching appellant's assignment of error in the denial of his motion for a directed verdict at the close of all evidence, that the ruling is not a part of the bill of exceptions. If we adhere to naked technicality and consider nothing beyond, this view of the record has some merit, but let us examine the record a little further.

First, the minute entry of March 28, 1942, that "counsel for the defendant now renews motion for a directed verdict on the same grounds heretofore given" (at close of the government's case, TR p. 10), "and it is ordered that said motion be and is hereby denied," (TR p. 12). Thus far Judge Mathews' excerpt is complete and correct, but a few lines farther along on the same page, which we think escaped his attention, we find that:

"Counsel for the defendant further excepts to the court's refusal to give defendant's requested instructions to the jury."

This, of course, embraced all instructions that had been rejected.

Here, then, is the exception itself.

We find it also urged as error in the notice of appeal

(TR p. 19) and in appellant's assignment of errors No. 12, (Appellant's Opening Brief, p. 6).

It cannot be denied that the motion to direct a verdict was made at the close of all evidence and excepted to seasonably. Admittedly it was made, refused, and exception noted at the close of plaintiff's case, and admittedly made and denied at the close of all the evidence. The exception to the latter ruling is not mentioned by Judge Mathews, but the record of it is clear. The only question is, will this inadvertent omission of former counsel in this case, to include these matters in the formal bill of exceptions, deter this court from considering the claimed error, when complete knowledge of it is otherwise shown? It seems to us that, for the court to consider such a deterrent, would be forsaking the substance and pursuing the shadow.

We think the case of *Danaher v. United States*, 39 Fed. (2) 325, applies here:

“Unless there is substantial evidence of facts excluding every hypothesis except guilt, the trial court must instruct the jury to acquit.”

The court also says in this case:

“Where all substantial evidence is as consistent with innocence as with guilt, the appellate court must reverse the conviction.”

We beg leave to remind the court that in the argument of this appeal in Los Angeles on October 5, 1942, present counsel suggested to the court his desire to make use of the reporter's transcript. It was suggested to him from the bench that possibly the United States attorney, then present, would agree that this transcript might be treated as a part of the record. The United States attorney agreed in open court that the transcript

might be so considered. He had ends of his own to be subserved, which he stated. As present counsel understood it, an order to that effect was then made. At any rate, the transcript was freely used by counsel for both sides in the ensuing arguments, and thenceforth.

We submit the foregoing argument, together with Judge Denman's dissenting opinion and the authorities he cites, as convincing reasons why a rehearing should be granted and the judgment of conviction reversed.

Respectfully submitted,

E. S. CLARK,
Attorney for Appellant.

No. 10110
IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

ROBERT EARL HOPPER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPLICATION FOR STAY OF ISSUANCE OF MANDATE

TO HON. CURTIS D. WILBUR, FRANCIS D. GARRECHT, WILLIAM DENMAN, CLIFTON MATHEWS, ALBERT LEE STEPHENS, AND WILLIAM HEALY, ASSOCIATE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

In the event that this petition for rehearing should be denied, it is the purpose and desire of appellant to apply to the Supreme Court of the United States for issuance of a Writ of Certiorari, and for that reason application is hereby made for a stay of the issuance of mandate of this Honorable Court pending the presentation and determination of such petition for Writ of Certiorari.

Dated at Phoenix, Arizona, this 30th day of December, 1943.

Respectfully submitted,

E. S. CLARK,
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I, E. S. Clark, attorney for appellant, do certify that in my opinion the foregoing Petition for Rehearing is well founded and meritorious and that neither said Petition nor said Application for Stay of Issuance of Mandate is interposed for the purpose of delay.

Dated at Phoenix, Arizona, this 30th day of December, 1943.

E. S. CLARK,
Attorney for Appellant.

No. 10128

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARTIN WOLDSON,

Appellant,

vs.

S. M. BAUMAN, ROY COPELAND and THE
NATIONAL SURETY COMPANY, a corpo-
ration of the State of New York,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United
States for the District of Idaho,
Northern Division.

FILED

JUL 6 - 1942

PAUL P. O'BRIEN,

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARTIN WOLDSON,

Appellant,

vs.

S. M. BAUMAN, ROY COPELAND and THE
NATIONAL SURETY COMPANY, a corpo-
ration of the State of New York,

Appellees.

Transcript of Record

**Upon Appeal from the District Court of the United
States for the District of Idaho,
Northern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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In the District Court of the United States for the
District of Idaho, Northern Division
No. 1488

MARTIN WOLDSON,

Plaintiff,

vs.

S. M. BAUMAN, ROY COPELAND and THE
NATIONAL SURETY COMPANY, a corpo-
ration of the State of New York,

Defendants.

COMPLAINT

Plaintiff complains and for cause of action
against said defendants, alleges and states:

*Page numbering appearing at foot of page of original certified
Transcript of Record.

I.

That at all the times herein mentioned and for more than twenty years immediately preceding the commencement of this action, the plaintiff has been and now is a citizen and resident of the city of Spokane in the State of Washington, and that at all the times mentioned in plaintiff's complaint the defendants S. M. Bauman and Roy Copeland have been and now are residents and citizens of Boundary County in the State of Idaho and that at all the times mentioned herein the defendant National Surety Company, a corporation has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of New York and engaged in writing Fidelity Bonds in the State of Idaho and the amount in controversy in this suit exceeds the sum of \$3,000, exclusive of interest and costs.

II.

That heretofore and on or about the 16th day of August, 1920 a petition was duly filed in the District Court of the Eighth Judicial District of the State of Idaho in and for the County of Boundary for the organization of Drainage District No. 1 of Boundary County, Idaho to [3] include lands in Sections 19, 20, 27, 28, 29, 30, 31, 32, 33 and 34 Twp. 62 N.R. 1 E.B.M. and lands in Sections 4, 5, 6, 8 and 9 in Twp. 61 N.R. 1 E.B.M. and in Sections 25 and 36 in Twp. 62 N.R. 1 W.B.M. all in Boundary County, Idaho, which said lands include the lands hereinafter particularly described. Said petition

was filed on or about August 16, 1920 and an order was thereupon duly entered directing notice of the hearing upon said petition to be given and notice of hearing thereon was duly given by the Clerk of said Court which said notice was duly published as required by law and due proof of such publication made and filed in said cause, and in accordance with said notice and the order directing the same to be given said matter came regularly on for hearing on October 21, 1920 and after hearing said matter the Court made and caused to be filed its findings of fact and conclusions of law and upon the same and in accordance therewith entered a decree organizing Drainage District No. 1 of Boundary County, Idaho, which said decree was dated October 21, 1920 and filed October 22, 1920, a true and correct copy of which is hereto attached marked Exhibit "A" and made a part hereof as fully as if written in full herein, and plaintiff alleges that said decree is unappealed from, and at all times since has been and now is in full force and effect.

III.

That thereafter an assessment roll was duly and regularly prepared and after notice given as required by law, said assessment roll was duly approved by said court. Thereafter a supplemental report was made and such proceedings were had, after due notice given as required by law, and an additional and supplemental assessment was duly made by the Court upon all of the lands in said

District and a contract was entered into for the construction of the proposed improvements in the manner proposed and the same were constructed in [4] accordance with the plans and specifications adopted and approved by the Court. At the time both of said assessments were approved they included 430 acres of land in what is known as Frye's Lake which was then covered with water and unsurveyed and there was assessed against the same in the first assessment \$13,994.46. Said District also included 1015.5 acres which was within what was known as Sproll's or Mirror Lake, which was also unsurveyed and against which an assessment in the sum of \$33,005.38 was made on the first assessment. By the supplemental assessment an additional sum of \$6,460.05 was assessed against the said 430.67 acres in Frye Lake and an additional assessment in the sum of \$15,232.50 was levied against the said 1015.5 acres in Sproll or Mirror Lake.

Thereafter for the purpose of more particularly describing said lands which had been within said Sproll or Mirror Lake, both of which your petitioner alleges were, at the time of the drainage thereof, meander lakes, said Drainage District No. 1 for the purpose of definitely locating the same so that the same could be properly assessed and described for assessment purposes, caused said land within said former Frye, and Sproll or Mirror Lakes to be surveyed and be divided. The lands in Sproll or Mirror Lake were divided into 27 tracts, 1 to 27 inclusive, and the said District for the pur-

pose of assessment allocated the same to the owners of land bordering on said lake and in like manner divided Frye Lake into 17 lots and likewise allocated the same to the owners of land bordering on Fry Lake and thereupon said Commissioners filed their report showing said conditions and plaintiff alleges, that all parties in interest, including said Drainage District No. 1 acquiesced therein and said lands have thereafter been transferred and described by said lots except as hereinafter alleges and said lands have been held, owned and occupied by the persons to whom the same were allocated and their [5] successors in interest, and have been generally known, transferred and assessed by the lot numbers given them and the supplemental report of the Commissioners show such fact and condition and particularly shows the exact description of lot numbers was filed in said Court having jurisdiction thereof, and after due hearing thereof said petition was duly approved by the Court in said proceedings in the month of August, 1924.

Supplementary thereto some of said lot numbers were changed so that where one owner obtained more than one lot as originally numbered, all of his lots retained the one number only and thereafter the addition of the letters of the alphabet were added in their order.

IV.

Plaintiff alleges that some of the lateral ditches contemplated by the original construction plan, but

which were not included with the original contract and were by the Commissioners of said District eliminated, were not built and the area to be taken for said ditches was assessed and added to the assessment of the owners in an amended roll was approved by the Court and levied an uniform assessment against all of the lands within said District, and particularly within Frye and Sproll or Mirror Lakes in the sum of \$47.5016 per acre. Objection was made to said assessment and report by the owners of said parcels of land Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 inclusive, within the Sproll or Mirror Lake area, appearing by their attorney O. C. Wilson of Bonners Ferry, Idaho, for the reason that said lands had not been drained or reclaimed.

Said matter came on for hearing and the parties appeared and by stipulation entered into on said hearing, the District secured the right of way for additional ditches in both Frye and Sproll or Mirror Lakes and it was agreed said ditches would be, by the said Commissioners of said District No. 1, dug, cleaned out, deepened and improved so [6] as to suitably and effectively drain said land above described within a reasonable length of time and on a hearing thereof the Court entered its decree dated August 24, 1924, providing among other things as follows:

“It is further ordered, adjudged and decreed that the Commissioners of Drainage District No. 1 of Boundary County, Idaho, within

a reasonable time, clean out, deepen and improve the present drainage ditch so as to suitably and effectively drain the land of objectors, to-wit:

MIRROR or SPROLL'S LAKE AREA

Parcel No.

11	Aceruing to Lot 2	Sec. 8 Twp. 61 N., R. 1 E.
12	“ “ “ 3	“ 8 “ 61 N., “ 1 E.
13	“ “ “ 4	“ 5 “ 61 N., “ 1 E.
14	“ “ “ 3	“ 5 “ 61 N., “ 1 E.
6	“ “ “ 5	“ 4 “ 61 N., “ 1 E.
Less North 20 ft.		
7	“ “ “ 1	“ 9 “ 61 N., R. 1 E.
8	“ “ “ 2	“ 9 “ 61 N., “ 1 E.
9	“ “ “ 3	“ 9 “ 61 N., “ 1 E.
3	“ “ N. 60 Rods Lot 4 Sec. 4 Twp. 61 N., R. 1 E.	
4	“ “ S. 20 “ “ 5 “ 4 “ 61 N., “ 1 E.	
5	“ “ N. 20 ft. “ 5 “ 4 “ 61 N., “ 1 E.	
10	“ “ “ “ 1 “ 8 “ 61 N., “ 1 E.	

V.

The Commissioners of said District failed to comply with said order and decree and the said land above referred to was not drained and thereafter the owner of said land made application to the Court in which said cause was pending for an order on the Commissioners of Drainage District No. 1 to show cause why they did not comply with said order and decree, and said order to show cause was issued December 13, 1924 and recorded on December 27, 1924. The hearing upon said matter was continued from time to time and the Commissioners of said district filed their answer thereon on or about the month of March, 1925. Said matter come regularly on for hearing and upon said hearing the

Court made and entered its Findings of Fact and Conclusion of Law and Decree wherein it was found and decreed that said land had not been drained and reclaimed and that they would have been drained [7] if the drainage ditches had not been obstructed and had been built and the laterals constructed as recommended by the Engineer and in said order and decree in said proceedings the said Court ordered the Commissioners of the District to forthwith clean out said drainage ditches and construct such laterals as might be required; to lower the outlet of the ditches and make such adjustments as might be required to drain said lands, a copy of which said Findings of Fact and Conclusions of Law is hereto attached, marked Exhibit "B" and made a part hereof.

That upon said hearing the Court made and entered its order and decree upon said Findings of Fact and Conclusions of Law, a copy of which said Decree is hereto attached marked Exhibit "C" and made a part hereof, and both are adopted as a part of this allegation, the same as if written in full herein.

VI.

Again the Commissioners of said Drainage District No. 1 did not comply with said order and decree and said lands remained undrained and not suitable for cultivation, and could not be cultivated and thereafter and about the latter part of the year 1927 or the early part of 1928, the Commissioners of said District presented an application

to the Court having jurisdiction thereof, and in which said Drainage District No. 1 was located and organized, wherein they set forth their failure to comply with said former order and sought additional authority to make changes and install a booster pump and on or about the 20th day of February, 1928, after a hearing had upon said matter, they secured and said Court entered an order requiring the said Commissioners of Drainage District No. 1 to deepen and clean out said ditches, construct other ditches, install booster pump and do whatever was necessary to make all of the land in said Drainage District No. 1 suitable for agricultural purposes, a copy of which said order above referred to is hereto attached marked Exhibit "D" and made a part hereof as fully as if alleged and set forth in full herein, and the plaintiff alleges that the Commissioners of said Drainage District No. 1 have not and never have complied with said order. [8]

VII.

None of said orders requiring the construction of said ditches, the cleaning out and deepening of said ditches and the doing of the work in reclaiming said land as to that portion of the land within Sproll or Mirror Lake were ever complied with by the Commissioners of said District and all of said orders are still in full force and effect and by reason thereof for many years all of said land was unsuitable for cultivation, but by recent actions part

of said land has now been made suitable for cultivation and tillable.

VIII.

At the time the land within the acreage hereinbefore described was originally assessed, it was lake beds and the condition thereof was only generally known as said land had always been covered with water and had never been dry so that the condition of the same could be seen. Thereafter a portion of said lake had been drained and a supplemental and additional assessment roll was filed covering the assessment in said area and due notice was given and hearing was had thereon and said assessment roll was confirmed and approved by which an assessment was duly levied upon each and every acre of land belonging to said objectors in the sum of \$47.5016 but on condition that the Commissioners of said Drainage District No. 1

“clean out said ditch to the original level thereof and maintain said ditch of said original level, construct such laterals as may be required, and lower the outlet of the ditch or make such adjustment thereof as may be required, and to do all of said work under such engineering supervision and direction as is acceptable to the Commissioners of said District and the objectors.”

The parties who were the Commissioners of Drainage District No. 1 at the time said order and decree was made, performed some work but never fully complied with said order and said order has never been complied with by the officials of said

District since it was made and by reason thereof a large portion of the land now belonging to this plaintiff within said Mirror Lake area was never reclaimed. [9]

IX.

In the year 1939 your petitioner made a request on the Commissioners of said District to complete said work as provided by said orders and decrees, but instead of so doing the Commissioners passed a resolution providing for the cleaning out only of the main ditches and proceeded to do said work during the fall and winter months when it was rainy and wet and was very expensive, but said work was of such extent that it did permit a considerable portion of said land to be plowed and reclaimed.

The said S. M. Bauman opposed the doing of said work, tried to prevent the same, notified the workers who were doing the same to quit and that they would not get their money and in every way possible interfered with the doing of said work notwithstanding the fact that he knew that it had been ordered by the Court and that the duty to do said work was imposed upon him as a Commissioner of said Drainage District as a matter of law.

X.

This plaintiff alleges that the defendant S. M. Bauman was appointed Commissioner of said District on June 17, 1939 and qualified on June 30, 1939 and ever since has been and now is the duly

appointed, qualified and acting Commissioner of said District.

That the defendant Roy Copeland was appointed Commissioner of said District January 2, 1940 and qualified January 12, 1940 and ever since has been and now is the duly appointed, qualified and acting Commissioner of said District and that both of said defendants qualified by giving a bond in the sum of \$5,000 conditioned as required by law for the faithful performance of their duties and the defendant National Surety Company, which this plaintiff alleges was and is a corporation of the State of New York, became the surety on the bond of said defendants and each of them and entered into a written undertaking to insure the faithful performance of the duties of said defendants, which said bond at all times since has been and still is in full force and effect.

XI.

That after the appointment of the said S. M. Bauman, he has [10] endeavored in every way possible to prevent the drainage of the lands belonging to the plaintiff and hereinafter more particularly described. He opposed the cleaning out of the ditches leading to said land. He notified the parties who had before been engaged by the officers of said District not to proceed with said work as they would not be paid and after the said defendant Roy Copeland became a member of said Board of Commissioners he joined with the said S. M. Bau-

man and co-operated with him in his wrongful and unlawful acts in trying to prevent the lands belonging to the plaintiff from being drained.

The plaintiff about the early part of the year 1940 made application to said Board of Commissioners to complete the work before started for the draining of said land and called attention to the fact that the work which had before been done was successful and had partially drained said land and if completed would drain all of said land, but said defendants Bauman and Copeland, notified this plaintiff that they would not permit said land to be drained and that they would not proceed with the draining of said land, or that they would not further clean out said ditches, either the main ditches, lateral ditches or to any of the work required and ordered by the Court and as plaintiff alleges it was the positive duty of said defendants so to do, but by joint co-operation of said two controlling the Board of Commissioners of said Drainage District they prevented any work from being done and notified this plaintiff that such would not be done and caused a resolution to be passed and placed on the minutes of the meeting claiming that plaintiff's land was worthless and that it could not be successfully drained and that they would not spend any more money draining it, all of which they knew was false and untrue and knew at the time such resolution was passed that the orders heretofore mentioned and described were outstanding requiring said work to be done, but in violation

of the [11] laws of the State of Idaho and of their oath of office and as their duty of such Commissioners and in violation of the orders of said Court appointing them, said two defendants acting wrongfully, unlawfully and maliciously have refused to perform their duties as such Commissioners and to proceed to drain said land.

Plaintiff alleges that the other Commissioner of said District, to-wit John Davidson refused to cooperate with said defendants and notified them that it was their duty to clean out the ditches and do said work, but notwithstanding said fact said defendants wrongfully, maliciously, unlawfully and in violation of their duties as such Commissioners, refused so to do.

XII.

The plaintiff thereupon notified the Commissioners of said District that if they did not proceed with said work, it would be necessary for him so to do, as he insisted said land should be drained as required by the orders of the Court and in this regard this plaintiff alleges that it was the intention by all of said orders and the intention of the statute of the State of Idaho that the land included within Drainage District No. 1 which had been made a part thereof and upon which drainage district assessments had been charged and upon which maintenance assessments were being levied and charged, should be drained and that it was the positive duty of the defendants to comply with said law and the orders of the Court, all of which they have

refused to do and in order to get said land drained this plaintiff, in the year 1940, entered upon said land with drag line and equipment and proceeded to clean out a part of said ditches and doing the work set forth and required by the orders of the Court hereinbefore referred to, and that the plaintiff in so doing succeeded in getting a part of said land drained so that more than 100 acres of said land, which had never before said time been drained so it could be cultivated, was drained so that it could be plowed [12] during the fall of 1940 and that if said ditches are cleaned out and kept cleaned out and the work provided in said orders carried out all of said land can be reclaimed within one or not to exceed two years time.

Plaintiff alleges that said work done by him was necessary to be done in order to reclaim said land and that the plaintiff's expenses in doing said work is the sum of \$1,502.41, in which sum the plaintiff has been specially damaged by the wrongful and unlawful acts of the defendants and because of their failure and neglect to perform the duties imposed upon them by law.

XIII.

Plaintiff further alleges the fact to be that the Commissioners of Drainage District No. 1 realizing that they had not properly drained said land and complied with the orders of the Court in so doing, and on the 24th day of September, 1935, at a meeting of said Board, said matter was brought to their attention and the Commissioners there-

upon agreed that until said land, amounting to approximately 220 acres and which is now the land owned by the plaintiff should be drained that the same should be withdrawn from maintenance taxation and that taxes for maintenance purposes should not be levied upon said land until the same was maintained, but thereafter wrongfully and unlawfully in violation of said resolution so passed by them, proceeded to assess said land and this plaintiff requested the defendants to cancel said assessments for the years 1936 to 1940 incl. and not to assess said land until the same should be drained, but they refused to do so and plaintiff alleges that to prevent said land from going to tax deed, he was required to and did pay said alleged maintenance taxes so assessed against said land when the same was not maintained or drained in the sum of \$1,477.97 and this plaintiff alleges that said defendants had no right to continue to levy or impose said drainage assessment against said land when they refused [13] to drain and reclaim the same and by reason thereof the plaintiff has been further specially damaged in the said sum so required to be paid for said drainage tax amounting to \$1,477.97 with interest thereon at the rate of 6% per annum from date of said payment, to-wit, the 18th day of December, 1939.

XIV.

Plaintiff became the owner of said land on or about the 16th day of July, 1932 and ever since has been and now is in the possession of said land.

Plaintiff alleges that by reason of the failure of said defendants to drain said land as it was their duty so to do and as required by the orders of this Court, this plaintiff has lost the use of said land amounting to 221.86 acres and that the use of said land for one year and said use was reasonably worth the sum of \$10.00 per acre and that the plaintiff by reason thereof has been specially damaged in the sum of \$2,218.60. That because said work has not been completed the plaintiff will not be able to secure crops on another 100 acres of said land for at least one year additional and that by reason thereof the plaintiff will be further damaged in the additional sum of \$1,000 because of the wrongful, and unlawful acts of said defendants in failing and refusing to comply with the orders of the Court and the statute of the State of Idaho.

XV.

Your petitioner alleges that during the time said land has been a part of said Drainage District and since the District commenced to assess the same for maintenance purposes and there has been assessed against the land of plaintiff hereinbefore set forth more than \$4,080.00 for maintenance purpose and although said amount has been assessed against said 221.86 acres the said Drainage District has not drained said land or maintained the same so that it could be cultivated and [14] that for the years 1938, 1939 and 1940, and while the plaintiff was the owner of said land, the assessments for main-

taining a portion thereof amounts to the sum of \$850.95 which has either been paid by the plaintiff or has been charged against said land and which has or will be lost to this plaintiff and in which said sum he has been specially damaged by reason of the refusal of the defendants to perform the duties imposed upon them by law and their neglect and failure in refusing to carry out the orders of the Court and the statute in such cases made and provided and this plaintiff alleges that said defendants have failed, neglected and refused to perform the duties as such Commissioners and by reason thereof said National Surety Company, the surety upon their bond, is liable to the full amount of said bond and plaintiff alleges that the action of said two defendants in failing and neglecting to perform their official duties in not draining said land was wrongful and was done intentionally by said defendants for the purpose of preventing the plaintiff's land from being reclaimed and for the purpose of preventing the plaintiff from having the use of said land and for the purpose of endeavoring to compel the plaintiff to pay the maintenance on said land which had never been maintained so that said maintenance money could be used for the benefit of others in said District, including said defendants who are themselves owners of land in said District which has been reclaimed and plaintiff alleges that said defendants have wilfully, wrongfully and in bad faith refused and neglected to perform their duties as Commissioners of Drainage District No.

1 in Boundary County, Idaho and that by reason thereof said defendants and each of them should be deprived of their office and that the penalty provided for by law should be assessed against said defendants and they should be required to pay the sum of \$500.00 each as required by the statutes of the State of Idaho.

XVI.

Plaintiff alleges that the land in Sproll or Mirror Lake which [15] is now owned by him, and which is particularly complained of herein, has been regularly laid out and platted and said plat was adopted for assessment purposes in making the assessments in this proceedings into various tracts, as follows:

That portion of Lot 5 Sec. 4, Twp. 61 N.R. 1 E.B.M. lying below the meander line of the former Sproll or Mirror Lake

That portion of the $S\frac{1}{2}$ of the $SW\frac{1}{4}$ of Sec. 4, Twp. 61, N.R. 1 E.B.M. lying easterly of the main lateral ditch, which said tracts last above mentioned comprise 38.45 acres and is referred to and designated as Lot 4 in Sec. 4 Twp 61 N.R. 1 E.

Balance of the $S\frac{1}{2}$ of $SW\frac{1}{4}$ of Sec. 4 and the $N\frac{1}{2}$ of the $NW\frac{1}{4}$ of Sec. 9, Twp. 61 N.R. 1 E.B.M. lying below the pumping area and which plaintiff believes is the old Government lake meander line boundary and designated and known as Tract 6-B in said Sections 4 and 9 comprising 57.32 acres, except that portion in

the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of said Sec. 4 designated as Lot 6-A comprising 10.36 acres

That portion of said land which would be the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 5, Twp. 61 N.R. 1 E.B.M. together with

That portion of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Sec. 8 Twp. 61 N.R. 1 E.B.M. which is referred to as Lot 7 Sections 5 and 8, comprising 48.84 acres

That portion of land which would have been the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 5, together with the balance of said land within the boundaries of said District and pumping area in the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Sec. 8 and a strip of land lying South and Westerly from the main lateral ditch and what would have been the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Sec. 5 known as Lot 8-A in Sections 5 and 8, comprising 66.39 acres

That said land has generally been referred to and was referred to by the Commissioners of said Drainage District No. 1 in withdrawing the same from assessment for maintenance purposes in 1935 as about 220 acres in Mirror Lake, and is the land intended to be withdrawn from maintenance taxes by said resolution and is the only land in Mirror or Sproll Lake district which has not been reclaimed.

Wherefore, plaintiff prays judgment against said individual defendants and each of them for the sum of \$7,049.93 damages together [16] with judgment against the bondsman of said defendants and each

of them to the full amount of their liability on each of said bonds.

II.

That the individual defendants and each of them be removed from office and that a penalty be entered against said individual defendants and each of them for the sum of \$500.00 in addition to the other damages hereinbefore prayed for.

III.

That the plaintiff have and recover of and from the defendants his costs and disbursements herein expended.

WHITLA & KNUDSON

Attorneys for Plaintiff, Res. &
P. O. Add. Coeur d'Alene,
Idaho

State of Washington,
County of Spokane—ss.

Martin Woldson being first duly sworn on oath, deposes and says: I am the above named plaintiff, that I have read the above and foregoing complaint, know the contents thereof and verily believe the facts therein stated to be true.

MARTIN WOLDSON

Subscribed and sworn to before me this 3rd day of March, A. D. 1941.

(Seal) E. V. KLEIN

Notary Public for the State of Washington, residing at Spokane.

My Commission expires June 28, 1944. [17]

EXHIBIT "A"

In the District Court of the State of Idaho
Eighth Judicial District, Boundary County
In the Matter of Organizing
of Drainage District.

ORDER AND DECREE ORGANIZING
DRAINAGE DISTRICT

This cause came on regularly for hearing this day on the petition of various property owners for the organization of the District referred to in the petition herein and embracing lands hereinafter described, the petitioners appearing by E. M. Flood, their attorney, and no objections having been made thereto and the court having found that notice of such hearing was given as directed by the court and the statutes of the State of Idaho and that this day was fixed for said hearing and that the land embraced in the proposed District is 4245 acres and that petitioners are the owners of in excess of one-fifth of said land, all of said land in said proposed district being in Boundary County, Idaho, and that the said lands in the proposed district are situate adjacent to Kootenai River and Deep Creek and the said land is covered with water during a large part of the summer season due to overflow water from Kootenai River and the backing of water into Deep Creek and in the spring of the year water covers all of said lands but as the season advances the water recedes so that part of said land later in the season is free from water and that as a result of

such overflow of such water crops can not be grown to advantage and on considerable portions thereof no crops whatever can be grown; that said lands are rich and capable of producing large yields of grains, grasses and other products and the drainage of said lands will greatly increase the production of cereals, grasses and other farm [18] products; that the water as it now exists has a tendency to stagnate during the summer months and render the surrounding sections to some extent unhealthy and a drainage of said land will remove a *manance* to the health of said community and will increase the revenues of Boundary County and the State of Idaho and that the plan of drainage proposed by the construction of ditches and dyking system is an advantageous and proper method of accomplishing the relief sought by petitioners, and that said waters are not navigable.

It is therefore ordered that said drainage district be and the same is hereby organized and established and that the name of said drainage district shall be "Drainage District No. 1 of the County of Boundary, in the State of Idaho", and said lands embraced in said District are portions of Sections 19, 20, 27, 28, 29, 30, 31, 32, 33 and 34 in Township 62 North, Range 1 East and Sections 4, 5, 6, 8 and 9 in Township 61 North, Range 1 East and Sections 25 and 36 in Township 62 North, Range 1 West in Boundary County, Idaho, and the Temporary boundaries of said district be and the same are defined as follows, to-wit:

Commencing at a point in the Southwest quarter of Section 27, Township 62 North, Range 1 E. where the railroad right of way of the Great Northern Railway Co. is intersected by the railroad right of way of Kootenai Valley Railway Co., thence along the Westerly line of said right of way of Kootenai Valley Railway Co. to a point where the right of way of said Kootenai Valley Railway Co. intersects the right of way of the Spokane International Railway Co. thence in a Westerly direction along the Southerly line of the right of way of said Spokane International Railway Co. for a distance of approximately $\frac{5}{8}$ miles to a point in the Southwest Quarter ($SW\frac{1}{4}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section 8, in said Township and range to the Westerly point of a ledge of rock along [19] said right of way; thence in a Northerly direction to a point near the East line of Lot 5 in said Section 28 on the Southerly bank of the Kootenai River; thence in a Westerly direction along the Southerly bank of said Kootenai River to the point where the Easterly bank of Deep Creek intersects said Southerly bank of the Kootenai River in said Lot 5 of Section 19, Township 62 North, Range 1 East; thence along the Easterly bank of said Deep Creek to a point where the said Easterly bank of said Deep Creek intersects the track of Spokane International Railway Co. in the $NE\frac{1}{4}$ of Section 36, Township 62 North, Range 1 West; thence in a Westerly direction along said track a distance of approximately 200 feet to the Southerly bank of

Fish Creek, situate in the Northeast quarter of Section 36, Township 62 North, Range 1 West; thence in a Southeasterly direction along the Northeasterly foot of the hill at an elevation of 1778 feet above sea level and through a portion of said Northeast quarter of Section 36, Township 62 North, Range 1 West, and Section 31, Township 62 North, Range 1 East and Sections 5, 6, 8 and 9 of Township 61 North, Range 1 East, the end of said line extending in said Southeasterly direction being in Lot 3, Section 9, Township 61 North, Range 1 East; thence continuing at said elevation along the said foot of the hill in a Northeasterly direction to a point where the said line intersects the Westerly line of the Great Northern Railway Company's right of way in Lot 5 of Section 4, Township 61 North, Range 1 East; thence in a Northerly and Easterly direction along the Westerly line of said Great Northern Railway Company's right of way to the place of beginning.

Done in open court this 21 day of October, 1920.

JOHN M. FLYNN

Judge.

#6552

State of Idaho,

County of Boundary—ss.

Filed for record at the request of E. M. Flood on the 22 day of Oct. [20] 1920, at 3-30 o'clock P.M., and recorded in Book 5 of Judgments on *on* Page 372. J. B. Brody, County Recorder by Dollie Bruce, Deputy. [21]

EXHIBIT "B"

In the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Boundary.

In the Matter of Drainage District
No. L of Boundary County, Idaho.

FINDINGS OF FACT AND CONCLUSIONS OF
LAW.

The above entitled matter coming on to be heard this 16th day of March, 1925, in open Court at Bonners Ferry, Idaho, upon the Petition for and Order to Show Cause made and entered herein on the 13th day of December, 1924, in connection with the confirmation of the Supplemental and Additional Assessment Roll filed in said matter relative to the Mirror or Sproll's Lake Area and the Fry's Lake Area in said District, and the matter being presented upon an agreed statement of facts on file in this Court, and the Court being satisfied in the premises and under said stipulated and agreed statement of facts does hereby make the following

FINDINGS OF FACT

I.

That the lands of the objectors, viz., Georgia A. Morrison, Frank Zimmerman, H. W. Mansfield, Martin Peterson, James DeYoe and Simon McDonald, have not been drained by the facilities provided by Drainage District No. 1 of Boundary

County, Idaho, and said lands are entitled to be suitable drained for agricultural purposes by virtue of the charges and assessments imposed upon said lands for said purposes;

II.

That the lands of the above named objectors would be drained if the main drainage ditch of said District had not been obstructed by the caving of banks so that the same is not as [22] deep as originally constructed and as called for by the plans and specifications of said ditch, and if several laterals were constructed as recommended by engineers and the outlet of said ditch lowered if finally recommended by the engineers.

III.

That if the original grade of the said ditch be restored from its outlet throughout its entire length, and several laterals were dug as recommended by the engineers, and the outlet of said ditch were lowered or other slight adjustment of said outlet made as finally determined by the engineers, the lands of the objectors would be drained sufficiently for agricultural purposes.

From the above Findings of Fact the Court makes the following:

CONCLUSIONS OF LAW.

I.

That the commissioners of Drainage District No. 1 of Boundary County, Idaho, are entitled to an

order dismissing the petition of the objectors in so far as said petition prays for an order vacating of modifying the Findings of Fact, Conclusions of Law or Decree entered herein relative to the confirmation of the supplemental and Additional Assessment Roll concerning the Mirror or Sproll's Lake Area and The Fry's Lake Area.

II.

That the objectors above named are entitled to an order directing the Commissioners of Drainage District No. 1 to forthwith, at the expense of said District and as an item of maintenance chargeable to the entire district, proceed to clean out said ditch to the original level thereof and maintain said ditch to said original level, construct such laterals as may be required, and lower the outlet of the ditch or make such adjustment thereof [23] as may be required, and to do all of said work under such engineering supervision and direction as is acceptable to the Commissioners of said District and the objectors herein.

III.

That the entire expense of the work, as above outlined, is a necessary expense of maintenance to be borne by the entire Drainage District as a whole; and the Commissioners of said district and objectors are entitled to an order declaring that an emergency exists for the creation of the indebtedness to be incurred in connection herewith in case the cost of such maintenance and repair

exceeds the revenue heretofore provided, for the maintenance fund for the year 1925.

W. F. McNAUGHTON

District Judge. [24]

EXHIBIT "C"

In the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Boundary.

In the Matter of Drainage District
No. 1 of Boundary County Idaho.

ORDER AND DECREE

The above entitled matter coming on to be heard this 16th day of March, 1925, upon the Petition and Order to Show Cause made and *entired* herein on the 13th day of December, 1924, in connection with the Supplemental And Additional Assessment Roll on the Mirror or Sproll's Lake Areas and on the Fry Lake Area of Drainage District No. 1 of Boundary County, Idaho, and said matter having been submitted to the Court upon an agreed statement of facts, and the Court being satisfied in the premises, and having made Findings of Facts and entered Conclusions of Law herein,

It is hereby ordered, adjudged and decreed,

I.

That the petition of the objectors, Georgia A. Morrison, Frank Zimmerman, H. W. Mansfield,

Martin Peterson, James Deyoe, and Simon McDonald, for an Order to Show Cause, which was filed on December 13, 1924, be and the same is hereby dismissed in so far as said petition prays for an order vacating or modifying the findings of Fact, Conclusions of Law or Decree entered herein relative to the confirmation of the Supplemental and additional assessment roll concerning the Mirror or Sproll's Lake Area and the Fry Lake Area:

II.

That W. H. Hoagland, J. H. McDonald and Frank Clapp, commissioners of Drainage District No. 1 of Boundary County, Idaho, be and they are hereby instructed to forthwith, at the [25] expense of said District and as an item of maintenance chargeable to the entire district, proceed to clean out said ditch to the original level thereof and maintain said ditch to said original level, construct such laterals as may be required, and lower the outlet of the ditch or make such adjustment thereof as may be required, and to do all of said work under such engineering supervision and direction as is acceptable to the Commissioners of said District and the objectors herein.

III.

It is further ordered, adjudged and decreed that an emergency exists for the creation of the indebtedness to be incurred in connection with the above work as outlined, and in case the cost of such maintenance and repair exceeds the revenue hereto-

fore provided for the maintenance fund of Drainage District No. 1 of Boundary County, Idaho, for the year 1924, the Commissioners of said District are hereby authorized and Directed to issue warrants of said district in payment of said necessary expense and raise the funds for the payment of said warrants as provided by drainage laws of the State of Idaho, and said warrants are hereby declared to be a preferred claim against said District and a proper maintenance charge.

Done in open Court at Bonners Ferry, Idaho, this 16th day of March, 1925.

W. F. McNAUGHTON

District Judge. [26]

EXHIBIT "D"

In the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Boundary.

In the Matter of Drainage District
No. 1 of Boundary County, Idaho.

ORDER

In the above entitled matter, the Commissioners of Drainage District #1 having made application to the Court for an Order for permission to do additional work and incur additional expense in connection with the drainage of the land within said

Drainage District, which has not been drained by the work heretofore done, said application being based upon Findings of Fact and Conclusions of Law and Order and Decree made and entered by the Court in the above entitled matter on the 16th day of March, 1925, by which it was determined by the Court that certain additional work should be done by the Commissioners of said District for the purpose of furnishing additional drainage to the land of certain objectors who appeared in opposition to the confirmation of certain assessments proposed to be made against the land of said objectors within the limits of said district and it appearing from the report of the present Commissioners of said Drainage District that there has been a change in the Commissioners of said District since said order was made and it further appearing that the above mentioned order of the Court has not been complied with by the Commissioners in the office at the time said order was made or by the Commissioners that have since been in office,

And whereas, by said above mentioned Order it was adjudged that an emergency existed requiring the construction of certain work, the cost of which would be borne as maintenance charge against said District and the Commissioners on this application having [27] presented with their application, plans of their Engineer for the construction of the work heretofore ordered to be done by the Court pursuant to the above mentioned Order made March 16, 1925, the total estimated cost of said improvement

being Twenty Three Thousand (\$23,000.00) Dollars in accordance with a detailed estimate hereto attached, reference to which is hereby made and the same made a part hereof.

Wherefore, it is ordered, that a new outlet be constructed by the Commissioners of said Drainage District #1 with a grade approximately two (2') feet lower than the present outlet of said District, said original outlet not to be changed or interfered with at all, the new outlet to be located as follows:

Beginning at the junction of the Main and Frye Lake ditches of Drainage District #1, which point is about 300' North of the Southwest (SW) corner of Lot Six (6) Sec. 19, Twp. 62 N. Rg. 1 E.B.M. running thence Northerly across said Lot Six (6) to the left bank of the Kootenai River a distance of about Five Hundred (500') Feet.

The Commissioners are further ordered, to cause the necessary pipe to be put in place for the purpose of carrying the water out of said Drainage District thru said proposed outlet and also to cause all pipes to be installed that may be necessary or advisable to successfully drain said land and conduct the water thru said outlet.

The Commissioners are further ordered, to deepen and clean out the ditches now constructed in said Drainage District to such depth as may be necessary and to construct such other ditches within said

Drainage District as may be necessary to sufficiently drain all the land within said Drainage District to such extent as may be necessary to make all of the land within said Drainage District suitable for agricultural purposes. [28]

The Commissioners are further ordered to install a pump at the following location, to-wit:

Approximately at the section corner common to Sections 31 and 32, Twp. 62, N.R. 1 E.B.M. on the township line between Twp. 61 and 62 N.R. 1 E.B.M.

and cause such pump to be operated at all times that may be necessary to provide suitable drainage for the land not drained by the drainage system as now constructed, provided, however, that in the discretion of the Commissioners the pump now in use may be moved to the above mentioned location instead of installing an additional pump if the Commissioners shall determine that the result can be accomplished by moving the location of the pump now installed.

Done in Open Court this 20th day of February, 1928.

W. F. McNAUGHTON
District Judge.

[Endorsed]: Filed Mar. 6, 1941. [29]

[Title of District Court and Cause.]

ANSWER

The Defendants Answering the Complaint of the Plaintiff, Allege and Says:

I.

Admit the allegations set forth in paragraph 1 of Plaintiff's Complaint except that Defendants deny that the amount in controversy in this suit exceeds the sum of \$3,000.00, exclusive of interest and costs as alleged in said Paragraph I, and Defendants allege that as shown by Plaintiff's Complaint the sum of \$1502.41 is the amount in controversy in this action, exclusive of interest and costs.

II.

Defendants admit the allegations set forth in Paragraph II of plaintiff's Complaint.

III.

Defendants admit the allegations set forth in Paragraph III of plaintiff's Complaint except that Defendants deny that the lands in Sproll or Mirror lake are owned by anyone other than the State of Idaho.

IV.

Defendants admit the allegations set forth in Paragraph IV of Plaintiff's Complaint.

V.

Defendants admit the allegations set forth in Paragraph [30] V of Plaintiff's Complaint.

VI.

Defendants admit the allegations set forth in Paragraph VI of Plaintiff's Complaint.

VIII.

Defendants deny generally and specifically every allegation set forth in Paragraph VII of Plaintiff's Complaint and Defendants allege that the matter in controversy herein, which is used as a basis of a claim of relief by the Plaintiff against the Defendants, has heretofore been decided in an action instituted and terminated in the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Boundary, in which action the identical Martin Woldson, now the Plaintiff herein, was Plaintiff, and Drainage District No. 1 of Boundary County, Idaho, the Defendant. That the same question raised herein relative to lack of satisfactory reclamation of the lands described was raised in the afore-mentioned action and after a hearing held thereon, an Order of Dismissal was entered. That copies, marked "Defendants Exhibit A" of the Petition, Response to Petition, and Order of Dismissal in said cause are attached hereto and incorporated herein and made a part of this Answer by reference.

Defendants further allege that the lands claimed to be owned by the Plaintiff herein, are situated below the level of the main ditch system of Drainage District No. 1 of Boundary County, Idaho, and that the original plans for reclamation of the

lands of Drainage District No. 1 were not properly prepared and designed so as to make possible the reclamation of the lands now claimed to be owned by the Plaintiff; That in an effort to reclaim said lands Drainage District No. 1 of Boundary County, Idaho, through its Commissioners, have expended upon said lands, in addition to the original construction costs of the Drainage System of said Drainage District, the sum of \$12,466.96 in the years 1925 and 1926, the sum of \$1493.19, [31] in the year 1933, and the sum of \$1500.00 in the year 1939, and various other amounts in other years, and in addition thereto have installed a booster pump to take water from said lands and pump the same into the main ditch of the District's drainage system; And said District, through its various Commissioners, have constantly endeavored to reclaim the lands now claimed to be owned by the Plaintiff herein, and that in addition thereto former claimants of ownership of said lands have expended thousands of dollars in an effort to reclaim said lands, all of which has been to no avail.

That the Defendants, Bauman and Copeland, herein have made a careful investigation of said lands and are absolutely satisfied that said lands cannot be reclaimed due to the fact that the plan for drainage and the system of diking and reclamation heretofore constructed is insufficient and inadequate on account of improper design of the drainage system of said District, and your Defendants allege that under the facts heretofore exist-

ing, they do not deem and have so found, that further expenditure of maintenance funds of the District is not proper for the purpose of obtaining an additional construction effect, and that the remedy of the Plaintiff in obtaining such reclamation is provided by the Statute of the State of Idaho in Section 41-2531, I.C.A. as amended by Chapter 49 of the Idaho Session Laws of 1935, which is as follows, to-wit:

Section 41-2531. Additional Construction Work and Assessments: In any case where the work set out in the plan for drainage as provided in this Chapter, or the work or improvements and the system of diking and reclamation constructed or in process of construction, are deemed or found by the board of commissioners of any drainage district at any time before or after the completion thereof to be insufficient or inadequate for any reason or by reason of any occurrence or circumstance, said board may order and cause to be done and constructed (in the manner provided and permitted by this Chapter and subject to the judicial proceedings required by this Chapter) additional work and improvements for the purpose of rendering sufficient and adequate the work and improvements and system of reclamation and drainage already constructed or for the purpose of reconstructing and for the preservation of the same; and also in any case

where in the judgment of said board, new, additional or separate works and improvements (in the nature of original construction or reconstruction work and improvements) shall [32] be or become necessary for the sufficient, safe and adequate drainage and reclamation of said district or for the safety and preservation of the work, improvements and system already constructed, said board may order and cause to be done and constructed such new, additional and separate works and improvements; and a new estimate of benefits may be made in each and all of said cases based on the additional or separate additional work or construction or reconstruction work proposed; and additional assessments for each or all of such additional or separate works and improvements may be made on the lands benefits in conformity with the procedure provided in this Chapter as in the case of original construction; and the lands in said district, or any part of such lands, shall be assessed in proportion to the benefits estimated as accruing to such lands because of such additional or separate work and improvements or because of such separate or additional construction and reconstruction work and improvements. The provisions of Chapter 25 of Idaho Code Annotated, shall apply to all proceedings had or matters or things done pursuant to the authorization of this section, the necessary substitutions and

changes being made because of any variant circumstances.

VIII.

Defendants admit the allegations set forth in Paragraph VIII of Plaintiff's Complaint except that Defendants deny that the assessments levied upon the lands now claimed to be owned by the Plaintiff, in the sum of \$47.5016 per acre was a conditional levy and Defendants admit that the various Orders referred to in said Paragraph VIII were not fully complied with and allege, owing, to the facts hereinbefore set forth in Paragraph VII of this Answer, that it was impossible to comply with said Orders.

IX.

Defendants admit that in the year 1939 the Plaintiff made a request upon the Commissioners of said District to complete said work as alleged in Paragraph IX of said Complaint, and admit that the Commissioners passed a resolution providing for the cleaning out only of the main ditch of said District and admit that said work was done during the fall and winter months, but deny that it was rainy and wet and that the work was expensive and deny that the work was of such extent that it permitted a considerable portion of said land to be plowed and reclaimed. [33]

The Defendant S. M. Bauman denies that he apposed the doing of said work or any work authorized by the Commissioners of said District

and denies that he tried to prevent the same and denies that he notified the workers who were doing any work authorized by the District to quit and that they would not get their money and denies that he, in every way possible, or at all, interfered with the doing of any work authorized by said Drainage District and denies that any of said work had been ordered by the Court and denies that the duty to do any work as alleged in Paragraph IX was imposed upon him as a Commissioner of said Drainage District as a matter of law and said S. M. Bauman alleges that he has at all times since he has been a Commissioner of said Drainage District, in every way used his best efforts to properly oversee the proper maintenance of the drainage system of said Drainage District.

X.

Defendants admit the allegations set forth in Paragraph X of Plaintiff's Complaint.

XI.

The Defendant S. M. Bauman denies that, after his appointment, as alleged in Paragraph XI of Plaintiff's Complaint, he has interfered in every way possible or that he has interfered in any respect to prevent the drainage of the lands claimed to be owned by the Plaintiff and hereinafter more particularly described. Defendant denies that he opposed the cleaning out of the ditches leading to said land. Defendant Bauman denies that he notified the parties who had before been engaged by the

officers of said District, not to proceed with said work as they would not be paid, and Defendant has no information and no knowledge of, to what work the Plaintiff refers; and the Defendant Roy Copeland denies that, as alleged in said Paragraph XI of Plaintiff's Complaint, he joined with the Defendant S. M. Bauman and cooperated with him in any wrongful or unlawful acts, for the purpose of preventing the lands claimed to be owned by the Plaintiff, [34] from being drained or reclaimed.

Defendants Bauman and Copeland admit that, as alleged in Paragraph XI of said Complaint, the Plaintiff, about the early part of the year 1940, made application to said Board of Commissioners to do certain work for the draining of said land, and claimed that the work which had been done in the past was successful and had partially drained said land and if completed would drain all of said land and Defendants admit that they notified the Plaintiff that they would not proceed with the draining of land and that they would not further clean out ditches on the land of the Plaintiff, but deny that they notified that they would not permit his land to be drained and deny that they refused to do any work required and ordered by the Court, and Defendants deny that by joint cooperation and control of the Board of Commissioners of said Drainage District, they prevented any work from being done and admit that they notified the Plaintiff that they could not do any work on his land and admit that they passed a resolution and placed the same

on the minutes of the Commissioners of said District, reciting that Plaintiff's land was not worth the cost of draining same at the expense of the District and that the Plaintiff's land could not be successfully drained and that they would not spend any more money draining it, but deny that such acts or admissions were false or untrue and deny that at the time such resolution was passed, that there were any orders outstanding requiring said work to be done and deny that they had violated any laws of the State of Idaho or their oath of office, and deny that they wrongfully, unlawfully and maliciously refused to perform their duties as such Commissioners, or violated any orders of the Court appointing them.

Defendants admit that John Davidson, the other Commissioner of said District, has not agreed with the conclusions of the Defendants Bauman and Copeland, but deny that said John Davidson notified said Defendants that it was their duty to clean out the ditches and do said work, and deny that said Defendants wrongfully, unlawfully and [35] maliciously, and in violation of their duties as such Commissioners, refused to comply with any alleged notice of the said John Davidson, and Defendants allege that said John Davidson is purchasing lands in Drainage District No. 1 under contract from the Plaintiff herein, and does not act whatsoever as a Commissioner, on his own initiative, but completely submits to the will and demands of the Plaintiff herein.

XII.

Defendants deny generally and specifically each and every allegation, statement and thing set forth in Paragraph XII of Plaintiff's Complaint and deny that Plaintiff has been specially damaged in the sum of \$1502.41, or in any damage whatsoever or at all by the alleged or any wrongful or unlawful acts of the Defendants and because of their alleged or any failure and neglect to perform any duties imposed upon them by law.

XIII.

Defendants allege that as to the matters set forth in Paragraph XIII of Plaintiff's Complaint, they have not and cannot obtain sufficient information upon which to base a belief as they were not Commissioners of said Drainage District during the period of the time from 1936 to 1940 as alleged in said Paragraph XIII; That they have no information as to when the maintenance taxes alleged by the Plaintiff to have been paid by him in the sum of \$1477.97, were levied, but Defendants allege that Commissioners of Drainage Districts in the State of Idaho have no authority to release land from payment of maintenance assessments and that such authority can only be obtained through proper Court action and that these Defendants are not liable for any acts done or neglect of duty indulged in by predecessors in office of these defendants and said Defendants deny that the Plaintiff has been specially damaged, as alleged in said

Paragraph XIII, in the sum of \$1477.97, or in any other sum whatsoever, or at all.

XIV.

Defendants deny that as alleged in Paragraph XIV of Plaintiff's [36] Complaint, the Plaintiff became the owner of the land thereafter described in said Complaint and deny that he is now the owner of said land, but admit that on or about the 16th day of July, 1932, the Plaintiff took possession of, and ever since said time has been and now is in possession of, said land. Defendants deny each and every other allegation and thing alleged in Paragraph XIV of Plaintiff's Complaint, and deny that the Plaintiff has been specially damaged in the sum of \$2218.60 or in any sum whatsoever or at all, and deny that said Plaintiff will be further damaged in the additional sum of \$1000.00, or in any sum whatsoever or at all, because of the wrongful and unlawful acts of said Defendants in failing and refusing to comply with any orders of the Court or with any statutes of the State of Idaho.

XV.

Defendants admit that as alleged in Paragraph XV during the time the lands mentioned have been a part of said Drainage District and since the District commenced to assess the same for maintenance purposes, there has been assessed against the lands claimed to be owned by the Plaintiff, more than \$4080.00 for maintenance purposes and admit that

although said amount has been assessed against said 221.86 acres the said Drainage District has not drained said land or maintained the same so that it could be cultivated, and that for the years 1938, 1939 and 1940, and while the Plaintiff claimed to be the owner of said land the assessments for maintaining a portion thereof, (though what amount is referred to by Plaintiff, Defendants cannot determine), amounts to the sum of \$850.95, which has either been paid by the Plaintiff or has been charged against said land, but the Defendants deny that the same has or will be lost to the Plaintiff in said sum or in any sum whatsoever or at all, and defendants deny that the Plaintiff has been specially damaged by reason of the refusal of the Defendants to perform any duties imposed upon them by law or by their neglect or failure in refusing to carry out any orders of the Court or any statutes in such cases made and provided, and Defendants deny that they have neglected [37] and refused to perform their duties as Commissioners of Drainage District No. 1 of Boundary County, Idaho, and deny that by reason thereof the National Surety Company, surety upon the bonds of the Defendants Bauman and Copeland, is liable to the full amount of said bonds or in any amount whatsoever or at all, and Defendants Bauman and Copeland deny that they have failed or neglected to perform their official duties and deny that any of their actions in connection with the drainage of said lands was wrongful or was done intentionally by

said Defendants for the purpose of preventing the Plaintiff's land from being reclaimed or for the purpose of preventing the plaintiff from the use of said land or for the purpose of interfering to compel the Plaintiff to pay the maintenance on said land which has never been maintained so that said maintenance only could be used for the benefit of others in said District, including said Defendants who are themselves owners of lands in said District which has been reclaimed, and Defendants deny that they have willfully, wrongfully and in bad faith refused or neglected to perform their duties as Commissioners of Drainage District No. 1 in Boundary County, Idaho and that by reason thereof they should be deprived of their office, and Defendants deny that there is any penalty provided by law which should be assessed against them or that they should be required to pay the sum of \$500.00 each as required by the Statutes of the State of Idaho, and Defendants deny that there is any such Statute of the State of Idaho and allege that they have at all times faithfully performed their duties as Commissioners of Drainage District No. 1 of Boundary County, Idaho.

XVI.

Plaintiffs admit the allegations set forth in Paragraph XVI of Plaintiff's Complaint except the Plaintiff's allegation that he is the owner of the lands described therein, which said allegation is specifically denied.

As a First Further Separate and Affirmative Answer and Defense to Plaintiff's Complaint, Defendants allege: [38]

I.

That the Defendant S. M. Bauman, was appointed Commissioner of Drainage District No. 1 of Boundary County, Idaho, on June 17th, 1939, and qualified on June 30, 1939, and ever since said time has been and now is a duly appointed, qualified and acting Commissioner of said Drainage District.

That the Defendant Roy Copeland was appointed a Commissioner of Drainage District No. 1 of Boundary County, Idaho on January 2nd, 1940, and qualified as such on January 12th, 1940, and ever since said time has been and now is a duly appointed, qualified and acting Commissioner of said Drainage District.

II.

That Plaintiff's cause of action herein is actually a suit against S. M. Bauman and Roy Copeland in their official capacity as Commissioners of Drainage District No. 1 of Boundary County, Idaho, and as such is a cause of action against said two Defendants as officers of the District Court of the Eighth Judicial District of the State of Idaho in and for the County of Boundary, and that said County is the only County having original jurisdiction over their actions as Drainage District Commissioners in connection with orders made or al-

leged to have been made by said Idaho District Court.

As a Second, Further, Separate and Affirmative Answer and Defense to Plaintiff's Complaint, defendants allege:

I.

Incorporate herein and make a part hereof, the same as if fully set out, Paragraph I of their first, further and affirmative answer and defense.

II.

That the Plaintiff Martin Woldson, had the contract for and did construction work in the construction of the reclamation system of Drainage District No. 1 of Boundary County, Idaho, and that said Plaintiff knew at that time, and has known at all times subsequent thereto, that the system of works designed for the reclamation of [39] said Drainage District, were not properly designed or constructed so as to properly reclaim the lands now claimed to be owned by the Plaintiff. That it shows upon the face of Plaintiff's Complaint that the Plaintiff Martin Woldson, claimed to have become the owner of the lands in question in the year 1932 and that no steps were taken by said Plaintiff to remedy said alleged conditions between the years 1932 and 1941, and as a result thereof the Plaintiff is now estopped as the result of said laches to maintain an action against these Commissioners on account of conditions now complained of prior to the appointment of these De-

fendants in the years 1939 and 1940 and for failure to ask for relief as provided by Section 41-2531, I.C.A., as amended by Chapter 49, of the Idaho Session Laws of 1935. That said Plaintiff having waited approximately nine years before this action was commenced and having waited that length of time there were various changes in the majority of the Board of Drainage District Commissioners in Drainage District No. 1, is guilty of laches and cannot be heard at this time.

As a Third, Further and Separate and Affirmative Answer and Defense to Plaintiff's Complaint, Defendants allege:

I.

Incorporate herein and make a part hereof, the same as if fully set out, Paragraph I of their first, further and affirmative answer and defense.

II.

That the main ditch of the reclamation system of Drainage District No. 1 of Boundary County, Idaho, which was originally constructed for the purpose of reclaiming the lands described in plaintiff's Complaint, runs from east to west, immediately south of said lands; That the lands claimed to be owned by the Plaintiff are situated below the level of the main ditch system of Drainage District No. 1, and there is not sufficient fall from said lands to the outlet of said Drainage District to carry off the water emanating from the [40] lands claimed to be owned by the Plaintiff; That the original plans

for reclamation of the lands of Drainage District No. 1 were not properly prepared and designed so as to make possible the reclamation of the lands now claimed to be owned by the Plaintiff; That in an endeavor to reclaim said lands over a period of years from 1921 to 1940, various programs were attempted, tried and cast aside, in an endeavor to reclaim said lands, and that finally a booster pump was installed in the original main ditch in an effort to take the water off of said lands by draining it into a sump and pumping water from said sump into the main ditch of said Drainage District at a point where there would be sufficient fall to carry said water to the outlet of the Drainage system. That large amounts of money were expended by the Drainage District in an endeavor to accomplish this result. That in the years 1925 and 1926, the sum of \$12,466.96 was expended and that in following years the amounts shown below were expended:

On Main Ditch South of Booster Pump		On Laterals of Lands Claimed by Plaintiff	
1933	\$1132.70	1933	\$1485.00
1934	639.44	1934	Nothing
1935	212.34	1935	32.00
1936	132.80	1936	Nothing
1937	1557.00	1937	37.50
1938	1139.74	1938	1784.47
1939	1152.73	1939	126.66
1940	1024.32	1940	754.88

for this purpose but without success, and other parties who claimed to be the owners of said lands personally expended over \$6000.00 in an endeavor to

drain the same; That in the year 1940, at the request of the Plaintiff herein, said Drainage District No. 1 purchased and installed a new booster pump at a cost of approximately \$1400.00; That the above and foregoing items of costs expended do not include the expense of the operation of the booster pump hereinbefore mentioned. That due to the wet and swampy condition of the lands through which said ditch is constructed it is absolutely impossible to maintain the ditch and prevent the sides from sloughing in and filling and obstructing the ditch.

[41]

That the amount expended in an endeavor to reclaim said lands greatly exceeds the amount of maintenance assessments levied against said lands; that part of said land was partially reclaimed during the years 1938, 1939 and 1940, but that said reclamation was due to dry climatic conditions heretofore unknown in the Kootenai Valley in which said lands are located, and not due to any work or any system of reclamation done or attempted by the Commissioners of Drainage District No. 1; That said dry conditions has lowered the water in the lands adjoining the lands claimed to be owned by the Plaintiff to a depth of 16 feet below the ground level of the said lands, resulting in an exceptionally dry condition of said adjoining lands; That the adjoining lands are higher in elevation than the lands claimed to be owned by the Plaintiff, and the natural drainage of said lands is towards the lands of said Plaintiff and the effect of the increased

lowering of the main ditch has resulted in great damage to the adjacent lands whereas no beneficial results have been obtained for the lands claimed to be owned by the Plaintiff; That your defendant Commisisoners have long been familiar with the situation existing and after careful and due consideration thereof, and making full and complete investigation of the possibility of reclaiming said lands, and after making a sincere effort to reclaim the same, came to the conclusion that it would be impossible to reclaim the same without making a new outlet in a different location from the District's present outlet and constructing new ditches for the purpose of reclaiming said lands, which construction, in the opinion of your Defendants, was not a proper maintenance charge against said Drainage District No. 1; That after full consideration of the questions involved, the Commissioners of Drainage District No. 1 of Boundary County, Idaho, did, at a regular meeting of said Commissioners held on the 18th day of May, 1940, take the following action:

“moved by S. M. Bauman, and second by Roy Copeland, *refering* to Mr. Woldson's letter of May 10th, 1940, demanding that the Commissioners of Drainage Dist. No. 1, immediately reditch the lands in parcel 1, 2, 3, and 4. [42] owned by him, the same being located in the south end of Dist. 1, adjacent to the Great Northern right of way, consisting of swamp land.

Whereas the Commissioners cleaned and deepened these ditches in Nov. 1939, at a cost of about \$1500.00, same being paid only last week, and it is observed that this ditching has done very little good and the fact of Mr. Woldson insisting that it be done over again within 6 months, is further proof of its failure. Also during the past 18 years the Commissioners have made repeated efforts on this land, ditching and cleaning ditches at the cost of several thousand dollars.

It is further stated that several owners of similar lands east and north of Mr. Woldson's land, along the Great Northern Right of Way, have never been able to reclaim or to crop their acres, but have never asked the Commissioners to ditch for them as they realized that it would cost more than the land was worth.

In view of these facts the Commissioners are convinced that further reclamation in this or similar areas can not be accomplished except at prohibitive figures and further expenditures at this time would be a waste of money."

III.

That at all times since their appointment as Commissioners of Drainage District No. 1 of Boundary County, Idaho, the Defendants Bauman and Cope-land, have, in every way, diligently and faithfully performed all of the duties incumbent upon them as Commissioners of said Drainage District.

The Defendant, the National Surety Company, a corporation of the State of New York, admits that it is surety on the bonds of the Defendants Bauman and Copeland as Commissioners of Drainage District No. 1 of Boundary County, Idaho; That as to all other matters set forth in Plaintiff's Complaint, said defendant Surety Company, has not and cannot obtain any information upon which to base a belief and therefor denies the same; and said Defendant Corporation further alleges that it can in no sense be held liable for any of the acts of the Defendants Bauman and Copeland, for the reason that the acts complained of and orders entered and orders claimed to have been made by various Courts, and all matters complained of in Plaintiff's Complaint, took [43] place prior to the time of the execution of the bonds hereinbefore admitted by the Defendant Corporation, to have been written on behalf of said Defendants Bauman and Copeland.

As a fourth, further Separate and Affirmative Answer and Defense to Plaintiff's Complaint, defendants allege:

I.

That the Plaintiff, Martin Woldson, claims to be the owner of the following described property, to-wit:

That portion of Lot 5, Sec. 4, Twp. 61 N.R. 1 E.B.M. lying below the meander line of the former Sproll or Mirror Lake.

That portion of the S $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Sec. 4, Twp. 61, N.R. 1 E.B.M., lying easterly

of the main lateral ditch, which said tracts last above mentioned comprise 38.45 acres and is referred to and designated as Lot 4 in Sec. 4, Twp. 61, N.R. 1 E.

Balance of the S $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 4 and the N $\frac{1}{2}$ of the NW $\frac{1}{4}$ of Sec. 9, Twp. 61 N.R. 1 E.B.M. lying below the pumping area and which plaintiff believes is the old Government lake meander line boundary and designated and known as Tract 6-B in said Sections 4 and 9 comprising 57.32 acres, except that portion in the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of said Sec. 4 designated as Lot 6-A comprising 10.36 acres.

That portion of said land which would be the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 5, Twp. 61 N.R. 1 E.B.M. together with

That portion of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Sec. 8, Twp. 61 N.R. 1 E.B.M. which is referred to as Lot 7, Sections 5 and 8 comprising 48.84 acres.

That portion of land which would have been the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 5, together with the balance of said land within the boundaries of said District and pumping area in the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Sec. 8 and a strip of land lying South and Westerly from the main lateral ditch and what would have been the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Sec. 5, known as Lot 8-A in Sections 5 and 8, comprising 66.39 acres.

whereas in truth and in fact, said Plaintiff is not the owner of said property, which fact is well

known to said Plaintiff; That said lands described consist of lands formerly contained within the boundaries of a meander lake, situated in Boundary County, Idaho, and that title to said lands is in the State of Idaho, which fact is well known to the Plaintiff herein. [44]

Wherefore, Defendants pray that the above entitled action may be dismissed and that they may go hence with their costs.

O. C. WILSON

Residence and P.O. Address,
Bonners Ferry, Idaho

EVERETT E. HUNT

Residence and P.O. Address,
Sandpoint, Idaho

Attorneys for Defendants

State of Idaho,

County of Boundary—ss.

S. M. Bauman, being first duly sworn, on oath deposes and says: That he is one of the Defendants in the above entitled action, that he has read the above and foregoing Answer and knows the contents thereof, and that he believes the facts therein stated to be true.

S. M. BAUMAN

Subscribed and sworn to before me this 16th day of May, 1941.

[Notarial Seal] O. C. WILSON

Notary Public for the State of Idaho,
Residing at Bonners Ferry, Idaho

[Endorsed]: Filed June 13, 1941. [45]

DEFENDANTS' EXHIBIT "A"

Unmarked Exhibit admitted by Order dated
1/5/42 and filed 3/21/42

In the District Court of the Eighth Judicial District
of the State of Idaho, in and for the County of
Boundary

In the Matter of Drainage District No. 1 of
Boundary County, Idaho.

PETITION

Now comes Martin Woldson and represents and
shows to the Court as follows:

I.

That he is the owner of a large tract of land
situated within the Drainage District No. 1 of
Boundary County, Idaho, and subject to assess-
ments for maintenance and improvements and for
the payment of interest and sinking fund of the
bonded indebtedness of said District and that he is
the owner and holder of all the outstanding unpaid
bonds of the said District aggregating approxi-
mately \$112,500.00.

II.

That the said Drainage District is in default in
the payment of one years interest and about
\$4,500.00 of its bonded indebtedness, and that a
large percentage of the lands within said District
are in default in payment of taxes and assessments.

III.

That heretofore and on the 16th day of March, 1925, the above entitled Court in the above entitled cause made and entered its findings of fact and conclusions of law, and order and decree, to which reference is hereby [46] made as fully as though said order were herein set out at length, and that by the said decree the commissioners of said district were instructed

“to forthwith, at the expense of said district and as an item of maintenance chargeable to the entire district, proceed to clean out said ditch to the original *level* thereof and maintain said ditch to said original level, construct such laterals as may be required and lower the outlet of the ditch or make such adjustment thereof as may be required and to do all said work under such engineering supervision and direction as is acceptable to the Commissioners of said District and the objectors herein.”

IV.

That said District and the Commissioners thereof have failed and neglected to make said improvements or to lower or clean the said ditch, or in anywise improve the said Drainage District and system except in part only and that the greater and more important part of said work is still undone.

That there is a large tract of said lands which have not been drained, to-wit, about 700 acres, and that the same is largely non-productive but would

grow good and profitable crops if properly drained. That the same can be drained by cleaning and lowering the said ditches. That in order to do so the work should be conducted in the months of July, August and September during the dry season. That without such improvements the lands will be largely non-productive and in the meanwhile large assessments are being levied and entered against the same, far in excess of the value of the said lands undrained.

V.

That the failure of the District to comply with [47] the order of this Court, made and entered on the 16th day of March, 1925, and to properly drain and reclaim the said lands as required and provided for in the said order, has resulted in greatly depreciating the value of this petitioner's security as the holder of the bonded indebtedness of said District, and imposes an unnecessary burden upon this petitioner and other landowners therein, as taxpayers of said District.

VI.

That the District is paying out large and excessive sums of money and incurring indebtedness for electric energy for pumping purposes whereas a cheaper power could be had by installing a Diesel engine and thereby saving a large part of the outlay for power.

Wherefore, your petitioner prays that an order and citation issue to the said District and the Com-

missioners thereof and that they be required to appear at a time and place to be specified in the said order and citation, and show cause why they should not proceed to make the improvements in the said lands in accordance with the said order and the requirements necessary to render said land tillable and productive; and petitioner prays for such other and further relief as may seem just in the premises.

J. F. AILSHIE and
ROBERT AILSHIE

Attorneys for Petitioner

State of Idaho,
County of Kootenai—ss.

Martin Woldson being first duly sworn deposes and says: [48]

That he has read the foregoing petition, knows the contents thereof; that the same is true of his own knowledge and that he believes it to be true.

MARTIN WOLDSON

Subscribed and sworn to before me this 22nd day of July, 1934.

[Notarial Seal] ROBERT AILSHIE

Notary Public in and for the State of Idaho,
residing at Coeur d'Alene, Idaho

State of Idaho,
County of Boundary—ss.

[Endorsed]: Filed July 23, 1934. Dollie Bruce, Clerk of the District Court. By H. M. Macnamara, Deputy. [49]

UNMARKED EXHIBIT

Admitted by Order dated 1/5/42 and filed 3/21/42

In the District Court of the Eighth Judicial District
of the State of Idaho, in and for the County of
Boundary

In the Matter of Drainage District No. 1
of Boundary County, Idaho.

RESPONSE TO PETITION

Come now the Commissioners of Drainage District No. 1 of Boundary County, Idaho and show to the Court that in the years 1925 and 1926 there was expended the sum of \$12,466.96 in compliance with the Court Order mentioned in the Petition of Martin Woldson as having been issued on the sixteenth day of March, 1925.

That also in the year 1933 there was expended for the same purpose as set forth in said Order the sum of \$1,493.19.

That in addition thereto in an effort to drain and reclaim said land one of the owners of part of the land personally expended the sum of \$6,000.00 in order to accomplish the reclamation of said land.

O. C. WILSON

Attorney for Drainage District
No. 1 of Boundary County,
Idaho.

Residence and P.O. Address:
Bonners Ferry, Idaho

State of Idaho,
County of Boundary—ss.

Ralph Richmond, being first duly sworn on oath, deposes and says that he is the Chairman of the Board of Commissioners of Drainage District No. 1 of Boundary County, Idaho, and that he has read the above and foregoing Response to Petition and knows the contents thereof, and that he believes the same to be true.

RALPH L. RICHMOND

Subscribed and sworn to before me this 6th day of August, 1934.

[Notarial Seal] **O. C. WILSON**

Notary Public

Residing at Bonners Ferry, Idaho

My Commission expires November 13, 1935. [50]

UNMARKED EXHIBIT

Admitted by Order

dated 1/5/42 and filed March 21, 1942

In the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Boundary.

In the Matter of

Drainage District No. 1

of

Boundary County, Idaho.

ORDER

The petition of Martin Woldson praying for an order requiring Drainage District No. 1 and the Commissioners thereof to show cause why they should not proceed to make improvements in the drainage system, ditches and canals in order to drain certain lands therein referred to in accordance with an order made and entered by this court on the sixteenth day of March, 1925, came on regularly for hearing at the Court House in Bonners Ferry on Tuesday, August 7th, 1934, Robert Ailshie appearing as attorney for the petitioner, Martin Woldson, and O. C. Wilson appearing as attorney for the Drainage District. The court heard evidence introduced by both the District and the petitioner and took the matter under advisement.

Now at this time the court being fully advised in the premises does hereby order and adjudge that the said petition be and the same is hereby denied

and petitioner is hereby granted leave to at any time renew the said petition and application or to file a new petition for other and further relief in connection with [51] the said decree or any matters therein covered.

Dated this 13th day of August, 1934.

EVERETT E. HUNT

District Judge

State of Idaho,

County of Boundary—ss.

[Endorsed]: Filed: Oct. 5, 1934. Dollie Bruce,
Clerk of District Court. By Harriet Drake, Deputy.

[52]

[Title of District Court and Cause.]

OPINION

Messrs. Whitla & Knudson, Coeur d'Alene, Idaho
Attorneys for the plaintiff.

O. C. Wilson, Bonners Ferry, Idaho
Everett E. Hunt, Sandpoint, Idaho
Attorneys for the defendants.

January 5, 1942

Cavanah, District Judge.

The plaintiff seeks a judgment against the defendants S. M. Bauman and Roy Copeland and the National Surety Company, for \$7,049.83 as damages and the entry of penalty against the individuals, of \$500.00 and their removal as commissioners of

Drainage District No. 1, in Boundary County, Idaho.

The defendant Bauman qualified as such Commissioner on June 30, 1939 and the defendant Copeland on January 12, 1940.

The District was organized under the laws of the State of Idaho on October 21, 1920, thereafter an assessment roll was regularly made and approved by the State District Court as provided by law, and a contract for the construction of the proposed improvements and works was entered into with the plaintiff.

At the time the assessment roll was finally approved it included 430.67 acres of land in what was known as Fry's Lake, then covered with water and unsurveyed, with an assessment of \$13,994.46, and also included 1015.5 acres which was within what was known as [53] Sproll's or Mirror lake and which was also unsurveyed, and assessed in the sum of \$33,005.38, and by supplemental assessment an additional sum of \$6,460.05 was assessed against the 430.67 acres in the Fry Lake area and the sum of \$15,232.50 against the 1015.5 acres in the Sproll or Mirror Lake area. Thereafter, for the purpose of more particularly describing the land in the Sproll or Mirror Lake area and definitely locating the same, the District caused the lands within the Fry and Sproll or Mirror Lake Areas to be surveyed and divided. The land in the Sproll or Mirror Lake area was divided into 27 tracts and for the purpose of assessment allocated

to the owners of land bordering the lake and in like manner divided Fry Lake area into 17 lots and likewise allocated the same to the owners of land bordering on Fry Lake.

It appears that the proceedings as to the organization, assessments, contracts for construction of the drainage works, an order requiring the District to clean out, deepen and improve the then ditch so as to suitably and effectively drain the land of the then objectors were approved by the State Court.

The plaintiff now complains by alleging that the Commissioners have failed to comply with the Court's order and decree and that the lands in Sproll or Mirror Lake Area was not drained at the time of the entry of the order and decree of the State Court. The defendants were not Commissioners of the District and the plaintiff became the owner of the land in question in 1932, and the defendants assert that he is now estopped as a result of his laches, to maintain the present action on account of conditions now complained of, prior to their appointment in the years 1939 and 1940, and for failure to ask for relief as provided by Sections 41-2531 I C A as amended by Chapter 49 Idaho Session Laws 1935 and also having waited approximately nine years during the period of various changes in the Board.

Plaintiff's lands are situated below the level of the main [54] ditch system and there doesn't seem to be sufficient fall from his land to the outlet of

the District to carry off the water emanating from plaintiff's land.

Between 1921 and 1940 various programs were attempted and cast aside in an endeavor to reclaim lands and finally a booster pump was installed in the original main ditch in an effort to take the water off of the lands by draining it into a sump and then pumping the water from the sump into the main ditch and carrying it to the outlet of the drainage system.

It seems further that during the years 1925, 1926 and in 1933 and to and including 1933 to 1940 large sums of money were expended by the District on the main ditch south of the Booster pump in which a portion thereof was expended on laterals on the Plaintiff's lands, together with about \$6,000 expended by others, and without success. In 1940 plaintiff made application to complete the work and the District then purchased and installed a new Booster pump at the cost of approximately \$1400.00. In that year the plaintiff expended \$1,502.41 in cleaning out part of the ditches and which sum he asserts he has been damaged.

The plaintiff further asserts that on account of the land not having been drained in September 1935 the Board agreed that they would not tax it until it had been drained and it would be withdrawn from the maintenance tax, but instead of doing so, proceeded to tax it and he paid the same to prevent the land from going to tax deed and was required to pay the sum of \$1,477.97.

He further claims damages of \$2,218.60 as loss of use of his land by reason of the failure to drain it since he became the owner in 1932, and the further sum of \$1,000 as not being able to secure crops on 100 acres of said land for one year and the further sum of \$850.95 amount paid by him as assessment for drainage.

The defendants assert that the amount expended in an endeavor to reclaim the land were greatly in excess of the maintenance [55] assessment levied on that part of the land; that the land was partially reclaimed during the year 1938, 1939 and 1940, and that the reclamation thereof was due to dry climatic conditions unknown in Kootenai valley, and not due to work or the system of reclamation done or attempted by the Commissioners and has lowered the water in the land adjoining the plaintiff's land to a depth below the ground level, resulting in a dry condition of the adjoining lands, which are in a higher elevation than the plaintiff's land, and that after investigation and careful and due consideration thereof the Commissioners reached the conclusion at a regular meeting of the Board that it would be impossible to reclaim said land without making a new outlet in a different location from the present outlet and constructing new ditches at prohibitive figures, and a waste of money, which would not be proper maintenance charges against the district.

The defendant Surety Company asserts that all of the acts complained of by the plaintiff, and orders

made by the Courts and other matters complained of took place prior to the time of the execution of the bonds written on behalf of the defendants Bauman and Copeland.

The plaintiff's title to the land in question are disputed by the defendants as defendants assert that the title is in the State of Idaho by reason of them consisting of land formerly contained within the boundaries of a meandered lake situate in Boundary County, Idaho. This contention as to Plaintiff's title is untenable under the evidence and the law.

Of course, we must begin the consideration of the issues and evidence that the defendants Bauman and Copeland and their surety are not responsible for the acts and conduct of the predecessors of Bauman and Copeland, nor of any other Commissioner and we must commence determining their liability, if any, from the date when they qualified as commissioners being that Bauman qualified on [56] June 30, 1939 and Copeland on January 12, 1940, and then ascertain if they have neglected their duties in such manner while acting as such commissioners in failing to drain that portion of the lands of the plaintiff in Sproll or Mirror Lake area, which comprises an area of some seven hundred acres.

It seems that the State Court did in 1925 and 1928 order that work should be done in the District to drain the lands therein, and thereafter in 1934, the plaintiff appeared in the State District Court and claimed that the work had not been done, but

it was there shown that a certain amount of work had been done necessitating the expenditure of \$36,-960.00 for the benefit of plaintiff's land and about five hundred acres owned by others. The work done as ordered by the Court in 1925 and 1928 was not sufficient, and when that appeared a property owner had ample opportunity to go into Court and compel the Commissioners to submit another estimate of proposed expenditure to the Court and obtain its confirmation before proceeding with the additional work, section 41-2531 I C A, McDonald v Pretzel 60 Idaho 354.

Plaintiff thus had a procedure prescribed by the Statute and as interpreted by the Supreme Court of the State of Idaho, affording him an opportunity to go into Court and compel the Commissioners to act and not wait over such a long period of years as here until he might have been damaged, and especially is that true where, as here, the claim of these defendants, refusal to act until the years 1939 and 1940, when they qualified as Commissioners.

However that may be, the evidence discloses that the defendants as Commissioners after they qualified did attempt to and did have done a certain amount of work in the District regarding the ditches and expended certain sums of money which improved the land to some extent, and that they on May 18, 1941, at a Board meeting adopted a resolution to the effect that as the Commissioners had cleaned and deepened the ditches in November 1939 at a cost of [57] about \$1500.00 which had done very little good

and they had during the past 18 years made repeated efforts on plaintiff's land in ditching and cleaning ditches at a cost of several thousand dollars and that several of the owners of similar lands east and north of plaintiff's land have never been able to reclaim or to crop their acreage, and have never asked the Commissioners to ditch for them as they realize that it would cost more than the land was worth, and that in view of these facts the Commissioners were convinced that further reclamation in that area cannot be accomplished except at a prohibitive figure and that further expenditures at that time would be a waste of money.

It further appears that there are springs and water comes to the surface and slides come and go in the ditch making it difficult to maintain certain portions of the system, although as stated, the plaintiff did not pursue the Course prescribed by the Statute in compelling the commissioners of the district to levy sufficient assessment to defray costs of draining the land but waited such a long time, and that these Commissioners on May 18, 1941, by resolution of the Board exercised their judgment in concluding that reclamation of the land could not be accomplished and further expenditures by the district would be a waste of money, brings the case now under the State Statute requiring the defendants to act and the universal rule in regard to the personal liability of public officers, that they are not personally liable for mistakes or honest intentions exercise of discretion or errors in judgment.

The failure to exercise judgment and discretion does not make an officer personally liable in damages unless they act wilfully, or corruptly or maliciously.

One reading the entire record cannot reach the conclusion that these defendants, when acting as Commissioners during the short period of time since they became members of the Board until this Action was instituted on March 6, 1941, comes under the rule [58] of making public officials personally liable to others who may have received some damage.

Reaching then the conclusion that the defendants are not personally liable it follows that the claim of penalty and that they be removed from office is untenable.

Decree be entered dismissing the complaint and defendants' costs.

Findings, and decree will be prepared by counsel for the defendants and served as provided by the rules of the Court.

[Endorsed]: Filed Jan. 5, 1942. [59]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on for hearing before the Court sitting without a jury at Coeur d'Alene, Kootenai County, Idaho, on Friday, November 21st, 1941 at which time the plaintiff ap-

peared in person and represented by his attorneys, Messrs. Whitla and Knudson, and the defendants Roy Copeland and S. M. Bauman appeared in person they, as well as the defendant The National Surety Company, being represented by their attorneys, Mr. O. C. Wilson and Mr. Everett E. Hunt. Thereupon all parties announced that they were ready for trial and the Court proceeded to hear the case. Thereafter briefs were filed by all parties herein and the Court being fully advised in the premises now makes the following:

FINDINGS OF FACT

I.

That at all the times herein mentioned and for more than twenty years immediately preceding the commencement of this action, the plaintiff has been and now is a citizen and resident of the City of Spokane in the State of Washington, and that at all the times mentioned in plaintiff's complaint the defendants S. M. Bauman and Roy Copeland have been and now are residents and citizens of Boundary County in the State of Idaho and that at all the times mentioned herein the defendant National Surety Company, a corporation has been and now is a corporation duly organized and existing under [60] and by virtue of the laws of the State of New York and engaged in writing Fidelity Bonds in the State of Idaho and the amount in controversy in this suit exceeds the sum of \$3,000.00, exclusive of interest and costs.

II.

That Drainage District No. 1 of Boundary County, Idaho, now is and since October 22nd, 1920 has been a duly organized drainage district under the laws of the State of Idaho. That on various occasions since that date there has been considerable litigation relative to the drainage of a portion of the land comprising said drainage district and particularly concerning a portion of said land within what is known as the Mirror Lake area thereof. The Court finds that the defendants herein are not liable for the acts of commission or omission of their predecessors, the defendant Bauman having qualified as a commissioner of said district on the 30th day of June, 1939 and the defendant Copeland qualifying as commissioner of said drainage district on the 12th day of January, 1940. That the defendant the National Surety Company, a corporation of the State of New York, is the surety or bondsman for both of said defendants and that said surety company is not liable on its bond for any acts of omission or commission of these defendants prior to the date of their qualification as commissioners of said drainage district.

III.

The Court finds that since they became commissioners of Drainage District No. 1, Boundary County, Idaho, the defendants, Bauman and Copeland have not been guilty of malfeasance, misfeasance or non-feasance in their conduct as commissioners of Drainage District No. 1, and that said defendants

are not personally liable for mistakes or honest intentions or errors in judgment as commissioners of said drainage district.

CONCLUSIONS OF LAW [61]

I.

That the defendants, Bauman and Copeland are not guilty of malfeasance, misfeasance or non-feasance in their conduct as commissioners of Drainage District No. 1, Boundary County, Idaho. That the National Surety Company, a corporation, is not liable on its bond for any malfeasance, misfeasance or non-feasance of said defendants as alleged in plaintiff's complaint. That no cause exists why the defendants, Copeland and Bauman, should be relieved of their office as commissioners of said drainage district and that no reason exists why any statutory penalty should be assessed against said defendants.

II.

That plaintiff's complaint herein should be dismissed and that the defendants recover their costs expended herein.

Dated and done this 13th day of January, 1942.

CHARLES C. CAVANAH

District Judge.

[Endorsed]: Filed Jan. 13, 1942. [62]

In the District Court of the United States, in and
for the District of Idaho, Northern Division

No. 1488

MARTIN WOLDSON,

Plaintiff,

vs.

S. M. BAUMAN, ROY COPELAND and THE
NATIONAL SURETY COMPANY, a Corpo-
ration of the State of New York,

Defendants.

JUDGMENT AND DECREE

The above cause came on for hearing before the Court sitting without a jury at Coeur d'Alene, Kootenai County, Idaho, on Friday, November 21, 1941, at which time the plaintiff appeared in person and represented by his attorneys, Messrs. Whitla and Knudson, and the defendants, S. M. Bauman and Roy Copeland appeared in person and represented by their attorneys, Mr. O. C. Wilson and Mr. Everett E. Hunt. The defendant The National Surety Company, a corporation, appeared by its attorneys, Mr. O. C. Wilson and Mr. Everett E. Hunt. All parties thereupon announced in open court that they were prepared to go to trial upon the issues. Thereupon testimony, both oral and documentary, was submitted for and upon behalf of the plaintiff and the plaintiff rested. Testimony, both oral and documentary, was submitted for and

and that by reason of simply the cleaning out of said ditches the water dropped approximately two feet under said land so that a large portion thereof could be cultivated and was cultivated in the ensuing year, and that the evidence undisputedly shows that said ditches are now partially blocked in places, with slides which if cleaned out and kept cleaned out will lower the water 18 inches to 24 inches, which will be sufficiently low to drain all of the plaintiff's land and that the evidence further shows without dispute that the defendants have positively refused and have not cleaned out the dragline ditches running to the land east of the *tressel*; that they have refused to permit their operator to go on said land and that said ditches, which were installed and constructed as a part of the original drainage system, have not been cleaned out for ten years, and that the only thing the plaintiff has requested is that said ditches be cleaned out so that the water can run through the same, which the defendants have refused to do. [65]

(d) That under the law the defendants have no right to decide whether or not said ditches should be cleaned out, but it is incumbent upon them to either follow the law and the orders of the Court organizing the District and clean out the ditches constructed, or to resign and that they have no alternative in the matter. That it is admitted by the pleadings in this case that all of the orders alleged, were made and said orders are themselves in evidence and are documentary evidence of the

decision of the Court and no where disputed or denied, and it is shown that the plaintiff, in order to get his lands drained, was required to and did perform the work for which he has made the charge, and that said work was a necessary work to be done and did drain a large part of said land, and that the plaintiff has lost said sum because the defendants would not perform their duty in draining said land. That the value of the use of said land is undisputed and it is shown that the plaintiff actually spent the money alleged.

(e) That the undisputed evidence in this case is that if the ditches are cleaned out all of the water, which is now thrown onto plaintiff's land because of this ditch draining Mud Lake, the lands of the plaintiff and others, situate beyond his land, would be drained to the sump where it is removed by the booster pump and the undisputed evidence shows that none of plaintiff's land is below the elevation of the main lateral but all would drain into the same through the ditches which have been constructed by the District, but that said drainage is prevented by reason of said ditches being allowed to fill up and not kept clean.

(f) That the undisputed evidence shows that at least since the year 1932 no money whatever was spent in cleaning out any of the large dragline laterals built by the District across the lands now owned by the plaintiff, except in the fall of 1939 and a small amount in 1940. That the undisputed evidence shows that [66] the booster pump installed

in 1940 was for the purpose of removing the water which had been collected from approximately 2000 acres of land and not directly referring to the plaintiff's land.

(g) That the evidence shows that the plaintiff is not seeking to hold the defendants Bauman and Copeland responsible for any damages done by their predecessors, but only for the damage occasioned because they would not perform their duties after they became commissioners.

There is no showing that the work done under the 1925 and 1928 orders would not have been sufficient if the commissioners had kept the ditches cleaned out but that because of not keeping the ditches cleaned out the water was not permitted to drain through the same and that said reason is the only reason said lands were not drained.

(h) That the undisputed evidence shows that the defendants did not expend any sum of \$1500.00 in cleaning the ditches in 1939 but that in the year 1939 and 1940 there was expended by the defendants, in cleaning out said ditches, the sum of \$881.54 and the sums are set forth and shown in paragraph II of the Third Affirmative Defense of the Answer of the defendants, on page 11 thereof, and it is further shown from the record that the commissioners of the District refused to make payment of said amount to the men who did the work and paid only approximately one-half thereof and refused to permit the dragline operator to complete

said work, and there is no dispute upon this matter in the record.

(i) That the defendants have no discretion in refusing to clean out the ditches and that the only recourse they have, if they deem the work is not feasible, is to go into Court and to have a hearing thereon, give the plaintiff an opportunity to be heard, and allow the Court to decide whether or not the work [67] should be carried on and that the plaintiff is not asking for any of the plans or works to be changed or altered but only that the ordinary necessary work of keeping said system in repair and keeping the ditches cleaned out be carried on. That the defendants have no right to exercise any discretion as to whether or not they will do the work but only the discretion as to how it shall be done and in this case the plaintiff is not making any claim because of the defendants *have* improperly done the work but because they will not have the work done, but have positively refused to do the work, which the statute requires them to do.

The plaintiff objects to the Findings herein because these facts, which are alleged and proven without controversy are not found in accordance with the pleadings in this case and the plaintiff respectfully asks that an oral argument be permitted upon these proposed Findings in order that

proper Findings may be made in this case.

Respectfully submitted,

WHITLA & KNUDSON

By EZRA R. WHITLA

Attorneys for Plaintiff.

Residence & Postoffice Address: Coeur d'Alene, Idaho.

The foregoing objections are overruled.

January 19th, 1942.

CHARLES C. CAVANAH,

District Judge.

[Endorsed]: Filed Jan. 19, 1942. [68]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO REPLY ON APPEAL, AND ASSIGNMENTS OF ERRORS.

Now comes Martin Woldson, plaintiff in the above entitled action and files the following Statement of Points upon which he will rely upon the prosecution of his appeal to the United States Circuit Court of Appeals from the Ninth Circuit, on the judgment and decree made and entered in the above entitled cause in the above entitled court on the 13th day of January, 1942, to-wit:

I.

The District Court of the United States for the District of Idaho, Northern Division, erred in making and entering the judgment and decree in said cause for the reason that said judgment and decree is contrary to the law.

II.

The Court erred in making said decree for the reason that the undisputed evidence in said cause shows that by the Decree of the District Court of the Eighth Judicial District of the State of Idaho, in and for Boundary County, judgments and decrees were duly entered requiring the land of the plaintiff to be drained and requiring the Commissioners of Dainage District No. 1 to do whatever was necessary to drain said land and that [69] said Commissioners failed, neglected and refused to do so.

III.

The Court erred in making said decree as the undisputed evidence shows that the plaintiff made written demand upon the defendants to drain said land and they refused to do so and failed, neglected and refused to perform their mandatory duty of keeping the drainage ditches constructed on said land for the purpose of draining the same, and keep the ditches cleaned out so that the water would flow through the same and thereby the damage complained of was caused.

IV.

The Court erred in making said judgment and decree as the undisputed evidence shows that certain ditches referred to as laterals and main drag line ditches were laid out by said District as part of the original plan for draining the same, approved by the District Court of the Eighth Judicial District of the State of Idaho, in and for the county of Boundary, in proceedings duly had for that purpose under which judgment and decree it became the mandatory duty of the Commissioners of said Drainage District to keep said ditches in proper condition and repair and to maintain the same so that the water would flow through the same. That said commissioners refused to do so and that upon demand the defendant commissioners refused to do said work and that because thereof plaintiff's land was not drained.

V.

The Court erred in making said judgment and decree as the undisputed evidence shows that the plaintiff has suffered the damage complained of in his complaint because of the refusal of said defendants to perform their mandatory duty of keeping said ditches in proper condition and repair.

VI.

The Court erred in entering said decree as the undisputed [70] evidence shows that said defendant commissioners have failed and positively refused to perform said duty and refused to allow

said ditches to be cleaned out and that said refusal was wilful and intentionally done on their part and that under the law the defendant commissioners have no right to refuse to perform said duty and that if they deemed the work to be improper or that it should not be done it is their duty to apply to the District Court for authority to change the plans, under which condition the land owner may be heard and his rights decided by the Court of competent jurisdiction.

VII.

The Court erred in entering said decree as the undisputed evidence shows that the plaintiff and his predecessors in interest, have paid all of the assessments levied against said land by the District and that they are entitled to have the ditches cleaned out and maintained.

VIII.

The Court erred in entering Findings of Fact No. 2 for the reason that the same is contradictory to the evidence, is not a finding of fact but is a conclusion of law and that the question of the defendants being liable for the acts of their predecessors was not a issue in controversy in this case and that no such claim was ever made by the plaintiff.

IX.

The Court erred in making Finding of Fact No. 3 for the reason that said finding of fact is not sustained by the evidence, but is contrary to the

uncontradicted evidence in the case and is not a finding of fact but is a conclusion.

X.

The Court erred in making Conclusion of Law No. 1 for the reason that the same is improper, is not sustained by the [71] evidence in the case and the undisputed evidence shows that the defendants S. M. Bauman and Roy Copeland are guilty of mal-feasance, misfeasance and non-feasance as Commissioners of Drainage District No. 1 and that they positively refused to perform their duty.

XI.

The Court erred in making Conclusion of Law No. 2 based upon the erroneous finding of fact.

XII.

The Court erred in failing and neglecting to make findings upon the issues in this case as follows, to-wit:

(a) The Court erred in failing to make findings upon Paragraph 2 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction.

(b) The Court erred in failing to make findings upon paragraph 3 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction, and the allegations are sustained by the undisputed evidence in the case.

(c) The Court erred in failing to make findings upon Paragraph 4 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction, and the allegations are sustained by the undisputed evidence in the case.

(d) The Court erred in failing to make findings upon paragraph 5 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction.

(e) The Court erred in failing to make findings upon Paragraph 6 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were [72] true and ordered by the Court having jurisdiction.

(f) The Court erred in failing to make findings upon Paragraph 7 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction.

(g) The Court erred in failing to make findings upon Paragraph 8 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction.

(h) The Court erred in failing to make findings upon Paragraph 9 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered

by the Court having jurisdiction and the uncontradicted evidence shows that the said Commissioners refused to comply with their duties and do said work.

(i) The Court erred in failing to make findings upon paragraph 10 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction and the allegations of said paragraph are conclusively shown and there is no dispute thereto.

(j) The Court erred in failing to make findings upon Paragraph 11 for the reason that the same are material in the case and are shown by the uncontradicted evidence to be true and shows that the defendants wilfully and intentionally refused to perform their duties as Commissioners.

(k) The Court erred in failing to find upon paragraph 12 for the reason that the same is shown by the uncontradicted evidence in the case to be true and is material in the case.

(l) The Court erred in failing to find upon paragraph 13 for the reason that the same is shown by the uncontradicted evidence in the case to be true and is material in the case. [73]

(m) The Court erred in failing to find upon paragraph 14 for the reason that the same is shown by the uncontradicted evidence in the case to be true and is material in the case.

(n) The Court erred in failing to find upon paragraph 15 for the reason that the same is shown

by the uncontradicted evidence in the case to be true and is material in the case.

(o) The Court erred in failing to find upon paragraph 16 for the reason that the same is shown by the uncontradicted evidence in the case to be true and is material in the case.

XIII.

The Court erred in failing to sustain the objections and exceptions of Martin Woldson to the proposed findings of fact as shown by said exceptions and objections filed herein.

XIV.

The Court erred in failing to find that said defendants had failed, neglected and refused to perform their duties as Commissioners of Drainage District No. 1 and keep the drainage ditches cleaned out and open so that the water would flow through the same and said fact is conclusively shown by the evidence in this case.

XV.

The Court erred in sustaining the objection to the admission in evidence of plaintiff's exhibits 20, 21 and 23.

EZRA R. WHITLA

E. T. KNUDSON

Attorneys for plaintiff and ap-
pellant, Res. & P. O. Add.
Couer d'Alene, Idaho.

[Endorsed]: Filed Apr. 8, 1942 [74]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable C. C. Cavanah, Judge of the District Court of the United States, for the District of Idaho:

The above named petitioner, Martin Woldson, plaintiff in the above entitled action feels aggrieved by the decree rendered and entered in the above entitled cause on the 13th day of January, 1942 by the above entitled Court, does hereby appeal from said Decree to the United States Circuit Court of Appeals, for the ninth circuit, for the reasons set forth in the Assignment of Errors filed herewith and he prays that the appeal be allowed and that citation be issued as provided by law and that a transcript of the record, in duplicate, upon which said decree was based duly authenticated, be sent to the United States Circuit Court of Appeals, for the Ninth Circuit under the rules of such Court in such case made and provided.

And your petitioner further prays that a proper order may be made fixing the amount of the Bond on Appeal to be required of the plaintiff appellant herein.

EZRA R. WHITLA

E. T. KNUDSON

Attorneys for plaintiff and appellant. Res. & P. O. Add.,
Couer d'Alene, Idaho.

[Endorsed]: Filed Apr. 8, 1942. [75]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Under Rule 73B, Notice is hereby given that Martin Woldson, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment in this case entered in this action on the 13th day of January, 1942.

EZRA R. WHITLA

E. T. KNUDSON

Attorneys for appellant, Res. &
P. O. Add., Coeur d'Alene,
Idaho.

[Endorsed]: Filed April 8, 1942. [76]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

This matter came on for hearing before the Honorable Charles C. Cavanah, United States District Judge, sitting without a jury, at Coeur d'Alene, Idaho, on November 21, 1941.

APPEARANCES

Messrs. Whitla & Knudson,
Coeur d'Alene, Idaho,
Attorneys for the Plaintiff.

Everett E. Hunt, Esq.,
Sandpoint, Idaho,
O. C. Wilson, Esq.,
Bonners Ferry, Idaho,

Attorneys for the Defendant. [779]

10 o'clock A. M. Nov. 21, 1941

JOHN DAVIDSON

being called as a witness on behalf of the plaintiff after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Whitla:

Q. Give your name to the Reporter, your place of residence and occupation?

A. John Davidson, Bonners Ferry, Idaho. Farmer.

Q. What official position do you hold in Drainage District No. 1, of Boundary County, Idaho.

A. Secretary of the Board of Commissioners.

Q. How long have you been a member of the Board of Commissioners.

A. Since the year 1925.

Q. How long have you been Secretary of the Board?

A. The commencement, since the commencement.

Q. As such Secretary do you have the records of the District in your possession?

A. I have most of them, maybe there are some meetings I don't have.

Q. We have asked for the record showing the assessments against this land in controversy in this case from the earliest time on down. Do you have such record?

A. No, I have not the record separately.

Q. Do you have the record showing the assessment imposed against this land in 1924? [80]

(Testimony of John Davidson.)

A. That is filed with the County Treasurer.

Q. Do you have the resolution providing what the assessment should be for that year?

A. There are a part of them. I wouldn't say that I had them all.

Q. Look and see if you have any resolution setting the assessment beginning with the year 1924.

A. I have them in the Clerk's office.

Mr. Whitla: May he be excused to get them?

The Court: Certainly, we will wait.

Q. You have found such a record?

A. Yes sir.

Q. What is the amount of the assessment for the year 1924?

Judge Hunt: To which we object for the following reasons: I realized that this question was probably going to come up and I want to call it to Your Honor's attention that it is all admitted by the pleadings, by both the plaintiff and the defendants, it is admitted that this drainage district was duly created in 1920. Now, counsel is starting to introduce a series of records going back to 1920 which was 19 years prior to the time that the defendant Copeland became a member of the Board of Commissioners, and twenty years prior to the time the defendant Bauman became a member of the Commission. The pleadings agree [81] that Copeland became a commissioner in June 1939 and Bauman in January 1940,—no, I have them reversed,—Copeland in 1940 and Bauman in 1939. The pleadings

(Testimony of John Davidson.)

admit the organization of the District, they admit the various assessments, they admit the whole set-up. This cause of action is against the defendants Bauman and Copeland for their acts as commissioners in 1939 and 1940, and they ask that they be removed from office and damages be assessed against them. It is our contention that the only material evidence is as to that which happened after these men became commissioners of the District.

(Argument of Counsel)

The Court: Under the statement as to the period of time involved here, where you are suing the two parties individually and seeking judgment individually, not against the District as a District but individually, it would seem under the law that the period of their liability would be from the time they were appointed as members of the board and attempted to function as members. Evidence prior to that time as to whether the District had made assessments, seems to me as against these men would be immaterial. That these defendants, when they came into the district that is, when they became members of the Board, that they refused to perform their duties under the order of the State Court, that, of course, would be another [82] question, but to go back in 1920, where the pleadings admit certain things, and to try to hold these defendants for the conduct of the district, seems to

(Testimony of John Davidson.)

me that it may be entirely without the pleadings.

Mr. Whitla: We are not trying that.

The Court: But you are suing these men individually here. It would be unjust.

Judge Hunt: We make the objection on behalf of the National Surety Company who are surety on the bonds.

Mr. Whitla: This goes back and shows the assessments of which they are charged with knowledge, knowing this land was in the District. They question the ownership of the land.

The Court: The ownership is another question. The fact that the land was in the District would not be conclusive. Ownership would have to be established as provided. A District may take in certain land and assess it against "A" and yet "A" may not own the land. I cannot see the materiality of it. Of course, after these men went in you can show certain assessments levied against the land of the plaintiff and if they refused to carry out the orders, and follow the law in draining the land, that may be shown from the time they went in office. But to go back of those years and say these men would be liable for [83] making or failing to make assessments and drain the land, that would not be the law, and would not be within the issues here.

Mr. Whitla: The only thing we are attempting to do is show that they collected money to do this

(Testimony of John Davidson.)

draining and that they are charged with this knowledge.

Judge Hunt: It would be immaterial for any purpose in this case.

(Further argument of counsel)

The Court: It occurs to me that under these pleadings that you could show that this land was within the District. Let's see, I think it is admitted. The organization of the district is admitted. That the land is within the District is admitted. Now then, at the time these three individuals who are now commissioners came into office, the fact that the land had been previously assessed by the District and that the land had not been drained could not be charged to these men, they would not be liable for what the plaintiff had paid previous to that time or as to its application. If there was a liability, it would be the District or the Commissioners previous to these defendants. They would not be liable prior to the time they came into office. You can show the assessments but it would be acts of other people, and they would [84] be liable only from the time they came into office and not previous neglect of others.

It would be unjust to say that you could put men in office nineteen years after something was done and hold them responsible. I cannot see that they are liable.

Mr. Whitla: We introduce this to meet allega-

(Testimony of John Davidson.)

tions that they made themselves. They raised the issue of fact here.

The Court: I think maybe that both sides can agree to this, that you can commence at the time these men came into office. You can show that this land had been in the district and previously assessed, but they are not liable for what was done, that these two men knew that the land had been assessed. Now, the question is, what did they do in carrying out the Orders of the Court, as Commissioners——

Mr. Whitla: They raised the issue from 1925 on.

Judge Hunt: The Court will recall that we moved to strike all this stuff that happened twenty years ago and the motion was denied, plaintiff insisted that we had to answer the allegation of the complaint and we have answered it.

The Court: The reason for denying that was to show that you have a District, that the plaintiff's [85] land was in the District; that there was an assessment made to drain it. The question is, was it drained? In a general way to show a kind of history of the district.

Judge Hunt: Those matters are all admitted.

The Court: I say, that is why I denied the motion. You can show the history of it. I think you will get before the Court a picture of the matter, as to how the situation was when these men went into office.

(Testimony of John Davidson.)

Mr. Whitla: Not for the purpose of claiming they were negligent during those years.

The Court: Simply that the land was in the District and assessed; that you claim these men didn't perform their duties from the time they went in office. It is not necessary to show the assessment for every year.

(Further Argument of Counsel)

The Court: I will state again that the parties have the right to show if they can, that this District was organized and when; whether this land of the plaintiff's was and is in that District and subject to be assessed for drainage purposes whether the land was drained or was not and up to the time these two men were appointed or made members of the Board, what was the condition that confronted them when they [86] entered on the duties or the office of Commissioners. They are chargeable with their own neglect. Now, if you were saying the District it would be a different matter, but you are picking out these two men who were put on this commission on a certain date. You can show the condition as I have stated but they picked it up from the point they went into office. Ultimately we are bound by the date these men were put in office. Now, as to whether the previous Commissioners drained this land or not is immaterial here. It would be unjust to hold officers in damage for what someone else might have done or not have done. Now you understand, let's go ahead.

(Testimony of John Davidson.)

Q. Mr. Davidson, you prepared a statement of the assessments from the year 1924 to 1937.

A. Yes.

Mr. Whitla: I will ask to have that marked for identification as plaintiff's exhibit number 1.

The Court: Is there any dispute as to this.

Judge Hunt: We have always admitted that. It is admitted by counsel verbally and by the pleadings.

Mr. Whitla: But they do not give the amount of the assessments.

Judge Hunt: We admit that it was assessed [87] from the time of the organization of the District up to now.

Mr. Whitla: Do you admit the amount of the assessments.

The Court: The records will no doubt show.

Mr. Wilson: This shows the percentage of the levy for every purpose.

The Court: Can you determine from that when it was made and its legality.

Mr. Whitla: The question of legality is not a question at this time.

Mr. Wilson: We admit that these percentages of the levy were made in each of the years.

The Court: Then it will be admitted, exhibit 1.

(Testimony of John Davidson.)

PLAINTIFF'S EXHIBIT No. 1

Admitted Nov. 21, 1941

LEVIES FOR DRAINAGE DISTRICT #1

Year 1924		Year 1927	
Bond interest.....	7%	Bond interest	7%
Maintenance	1½%	Maintenance	1½%
Pumping	1½%	Operation of pumps.....	1½%
Outstanding warrants	4%	Bond redemption	171½%
	<hr/>		<hr/>
	12%		251½%
Back Assessments		Year 1928	
Bond interest	7%	Bond interest	5%
Outstanding warrants	31½%	Maintenance	1½%
	<hr/>	Warrant redemption	21½%
	101½%	Bond redemption	171½%
			<hr/>
			251½%
Year 1925		Year 1929	
Same as for 1924		Bond interest	4%
		Repair & Maintenance.....	21½%
		Operation of Pumps.....	1½%
		Outstanding warrants	13%
			<hr/>
			20%
Year 1926		Year 1930	
Bond interest	7%	Bond interest	5%
Warrant redemption	8%	Maintenance	31½%
Repair & Maintenance.....	1½%		<hr/>
Operation of pumps.....	1½%		81½%
	<hr/>		
	16%		
Back assessments		Year 1931	
Interest on bonds.....	7%	Bond interest	41½%
Warrant redemption	31½%	Pumps & Maintenance.....	21½%
	<hr/>		
	101½%		

(Testimony of John Davidson.)

Year 1932		Year 1935	
Maintenance & Pumps.....	2½%	Bond redemption	3%
Warrant redemption	6%	Outstanding warrants	3%
	<hr/>	1936 Maintenance	3%
	8½%		<hr/>
			9%
Year 1933		Year 1936	
Bond interest	4%	1937 Maintenance 3%.....	3%
Bond redemption	3%	Int. on outstanding	
Outstanding warrants	3%	indebtedness	3.2%
Maintenance	2%		<hr/>
Maintenance (1934)	1%		6.2%
	<hr/>		
	13%		
Year 1934		Year 1937	
Warrant redemption	3%	1938 Maintenance	3%
Bond redemption	2%	Bond interest	3%
Maintenance (1935)	3%	Bond redemption	9%
	<hr/>		<hr/>
	8%		15%
Assessed valuation \$204,711.96			

[385]

Q. How much an acre was levied against that district? A. You mean the total?

Q. How much an acre was originally levied?

A. I would not say that, but I have a record.

Mr. Wilson: It is admitted that the average benefit was approximately \$47.50 per acre.

The Court: Now that is agreed, go ahead.

Q. Can you give us the levy for the years 1938, 1939 and 1940?

Mr. Wilson: We have certified copies of [88] the levies from 1931 to 1941.

(Testimony of John Davidson.)

Mr. Whitla: If he can give the amounts I want that.

The Court: Counsel says he has certified copies and that would make them correct.

Mr. Whitla: These are from the office of the Clerk and there seems to be a difference between the office of the Clerk and the District.

Mr. Wilson: These are the levies that were made.

The Court: Go ahead if you cannot agree.

Q. Give us the levies for 1938, 1939 and 1940.

A. This is the record for 1937.

Q. In 1937 what did you levy.

A. The 1938 levies.

Q. Will you read the maintenance, bond, and bond interest.

Mr. Wilson: It will be agreed that the maintenance levy was 3%; the Bond interest 3% and Bond redemption 9%.

The Court: That is agreeable.

Mr. Whitla: Yes.

Q. Now for the year,——

Mr. Whitla: The levy for the year, made in 1939 for 1940 was 2½% for bond interest; 3% for maintenance and 9% for bond redemption. [89]

Mr. Wilson: It is so stipulated.

Mr. Whitla: For 1940 maintenance for the year was 4½% and bond redemption 5½%.

Mr. Wilson: We so stipulate.

Q. Mr. Davidson, did Mr. Woldson take up with the District while you were commissioner the propo-

(Testimony of John Davidson.)

sition of getting this land reclaimed about the year 1934 or 35? A. Yes, he did.

Q. Do you have the resolution passed at that time as to what you would do? A. Yes.

Q. As to what you would do relative to that matter? A. Yes.

Judge Hunt: We object to what the Commissioners did in 1934, it would be immaterial. The records show that the defendants Bauman and Cope-land didn't become commissioners until 1939 and 1940 and the National Surety Company assumed no liability until Bauman was appointed in 1939.

The Court: I am holding that the purpose is not to show that the defendants were responsible, but to show what the condition was.

Mr. Whitla: And that the Commissioners when they went in office had their attention called to this matter. [90]

A. It is a resolution of August 2, 1934.

Q. August 2, 1934.

A. A Court hearing at the Court house.

Q. Mr. Davidson, you passed a resolution at some time providing that this land should not be assessed until it was trained, can you find that.

A. I might but it would take quite a little time.

Q. Calling your attention to the resolution of the 24th of September 1935, was that the resolution passed by the Drainage District at that time?

A. Yes sir.

(Testimony of John Davidson.)

The Court: Those are records of the Board of Commissioners of the District, are they?

A. They are the records of the Board, of the District.

Mr. Wilson: We admit that those are the minutes of September 24, 1935, of the Commissioners of Drainage District Number 1, but we object to the introduction of the same as being entirely incompetent, irrelevant and immaterial.

Mr. Whitla: I want to read the minute.

The Court: You may read it into the record.

Mr. Whitla: I now offer the minutes of the Board for September 24, 1935. "Minutes and records of Drainage District No. 1, Bonners Ferry, Idaho. Commissioners of Drainage District Number 1, met on this 24th day of September 1935. Commissioners present were Ralph [91] Richmond, John Davidson and P. T. Casey. Mr. Martin Woldson and Mr. E. W. Wheelan were also present. Commissioners met for purpose of making levy of 1936 taxes. A resolution in regard to the same is here attached. It was also decided at this meeting to withdraw about two hundred and twenty acres in Mirror Lake from maintenance taxation. Motion made by Richmond and seconded by Davidson that said land be withdrawn. The following accounts were allowed and warrants issued for same." then it lists the accounts, and then reads; "There being no other business the meeting adjourned." Then it is signed by Richmond, Davidson and Casey.

(Testimony of John Davidson.)

The Court: Now what does that resolution touch upon which it says it attached.

Mr. Whitla: The fixing of the assessment levies for that year.

Mr. Wilson: We agree that is the resolution.

The Court: It may be admitted.

Q. Mr. Davidson, what two hundred and twenty acres of land does that refer to?

A. That refers to the lower swamp land, mostly laying on the south side of the main ditch.

Q. It shows that Mr. Woldson was present?

A. Yes sir.

Q. Was Mr. Woldson looking after his own interest? A. Yes sir.

Q. Was he the owner of that 220 acres? [92]

Judge Hunt: Objected to as calling for a conclusion.

Mr. Whitla: Strike that.

Q. Was that the same land in controversy here?

A. Yes, absolutely.

Q. Was there any notice served on yourself and the other commissioners in the spring of 1940, requiring that you drain this land?

A. There was, yes sir.

Q. Do you have such a notice? Did you exempt that land from maintenance or did you proceed to charge and collect?

A. We proceeded to charge the maintenance tax.

(Testimony of John Davidson.)

Q. Every year? A. Yes sir.

Q. In 1940 did you receive a notice addressed to the Commissioners of the District relative to draining this land?

A. I received a notice and it is in the files, it would take me sometime to find it.

The Court: What do you refer to now Mr. Whitla?

Mr. Whitla: I refer to the notice of May 10, 1940 requesting that this land be drained.

The Court: All right.

Mr. Whitla: I ask that this be marked as plaintiff's exhibit number 2. [93]

Q. Now, handing you exhibit number 2, I will ask you if that is a copy of the letter received by the Commissioners demanding the draining of this land? A. It is.

Mr. Whitla: I offer this exhibit as plaintiff's exhibit number 2 in evidence.

Mr. Wilson: I think in paragraph 11 that is also admitted.

(Testimony of John Davidson.)

PLAINTIFF'S EXHIBIT No. 2

Admitted Nov. 21, 1941

Martin Woldson
646 Peyton Building
Spokane, Washington

May 10, 1940

(Extra Copy)

Mr. S. M. Bauman, Chairman,
Mr. John Davidson, Secretary,
Mr. Roy Copeland,
Commissioners, Drainage District #1,
Bonners Ferry, Idaho.

Gentlemen:

I have heretofore requested you to do the necessary maintenance work on my land, as follows:

Parcel #1, Lot 4, Sec. 4 (East G. N. Ry.)	comprising 12.00 ac	
Parcel #2, Lot 8A, Secs. 5 & 6; Lot 8B, Sec. 8; Lot 8C, Sec. 5; Lot 8D, Sec. 5	" 146.45	"
Parcel #3, Lots 3 & 4, Sec. 5 Lots 2 & 3, Sec. 8; Lot 1, Sec. 8; Lot 7 Secs. 5 & 8	" 83.38	"
Parcel #4, lots 2 & 3, N. W. of G. N. Ry. Sec. 9; Lot 4 less part East of G. N. Ry. Sec. 4; Lot 6A, Sec. 4; Lot 6B, Secs. 4 & 9, all in Twp. 61	" 121.84	"
Total	363.67	"

A resolution was passed Dec. 17, 1937, by the Commissioners of District #1 to the effect that 220 acres of above land would be withdrawn from maintenance assessment, but assessments have been levied

(Testimony of John Davidson.)

and paid up to the present time on all the above land. The law positively requires you to drain this land and to open the ditches and keep them open. This land has already paid \$6395.48 for maintenance assessments, but you have not kept up the maintenance on same. You have not cleaned out the ditches and have not put the land in condition to drain properly.

I hereby make demand on you to proceed to clean out the ditches on above land and do the maintenance work as required by law and which is necessary to properly drain this land, and if you do not do so, I will institute proceedings against you and expect to hold your bondsmen personally liable for all damage I have sustained.

There are at present in District #1 three drag-lines, all of which are in good working condition and any one of which is ready to start work at once. Unless you take action and have such work started on or before the 20th of this month, I will be obliged to institute proceedings.

I have tried to co-operate with the Commissioners of District #1 to further the interest of the entire district, but it seems that I am unable to get any desired results, and I find that the Commissioners are not performing their required duties. As a result, the money which has been paid for maintenance of this land has not been of full benefit to me. For the amount of money which has already been paid in for maintenance purposes, it should

(Testimony of John Davidson.)

have amply provided for the draining of above land.

Unless you proceed to perform your legal duties and see that this particular land in District #1 is properly drained, an action will have to be started against you and I am writing to make this demand on you as a preliminary proceeding to commence the action unless you start the above work on or before 20th inst., as mentioned above.

Please let me have a prompt reply.

Yours very truly

MARTIN WOLDSON [388]

The Court: Let it go in, I will read it.

Q. What was done in regard to this by the Commissioners?

A. Meeting was called by the Commissioners.

Q. Have you the minute of date of May 10?

A. I have the meeting of the 20th of May 1940.

Q. Have you the one preceding that?

A. No sir.

Q. Calling your attention to the date of May 18, did you have a meeting at that time?

A. The 18th of May 1940.

Q. Who was present at that meeting.

A. All the commissioners being present.

Q. And who were the Commissioners at that time?

(Testimony of John Davidson.)

A. Mr. Bauman and Mr. Copeland and myself.

Mr. Whitla: I now offer in evidence the minutes of this meeting of May 18, 1940.

Judge Hunt: No objection. [94]

The Court: It may be admitted.

PLAINTIFF'S EXHIBIT No. 3

Admitted Nov. 21, 1941

Minutes and records of drainage Dist. No. 1 Boundary County Ida.

Commissioners of Drainage Dist. No. 1, held a meeting on this 18th day of May 1940.

All Commissioners being present.

The meeting was called by the chair in regards to a letter received from Mr. Woldson concerning some work in Mirror Lake.

Moved by S. M. Bauman and seconded by Roy Copeland, referring to Mr. Woldson's letter of May 10th, 1940, demanding that the commissioners of Drainage Dist. No. 1, immediately reditch the lands in parcel 1, 2, 3, and 4, owned by him the same being located in the south end of Dist. 1, adjacent to the Great Northern right of way, consisting of swamp land.

Whereas the Commissioners cleaned and deepened these ditches in Nov. 1939, at a cost of about \$1500.00, same being paid only last week, and it is observed that this ditching has done very little good and the fact of Mr. Woldson insisting that it be done over

(Testimony of John Davidson.)

again within 6 months, is further proof of its failure. Also during the past 18 years the Commissioners have made repeated efforts on this land, ditching and cleaning ditches at the cost of several thousand dollars.

It is further stated that several owners of similar lands east and north of Mr. Woldson's land, along the Great Northern Right of Way, have never been able to reclaim or to crop their acres, but have never asked the Commissioners to ditch for them as they realized that it would cost more than the land was worth.

In view of these facts the Commissioners are convinced that further reclamation in this or similar areas can not be accomplished except at prohibitive figures and further expenditures at this time would be a waste of money.

Vote:

S. M. Bauman: Yes

Roy Copeland: Yes

John Davidson: No.

W. M. BAUMAN

JOHN DAVIDSON [389]

Mr. Whitla: May I read this into the record at this time.

The Court: Just make your offer and we can make copies later.

(Testimony of John Davidson.)

Q. Mr. Davidson, did you get a letter from Mr. Woldson relative to that matter?

A. I think I did.

Q. Will you produce that letter?

A. I would not say if it is in the files or not.

The Court: Could you look for this during the noon recess and not take the time now.

Q. I will ask you to get this during the noon hour, calling your attention to the fact that it was not drained and telling you his position in the matter. A. Yes sir.

Mr. Whitla: I wonder if I could have this marked as plaintiff's exhibit 4 for identification.

Mr. Wilson: We admit that plaintiff's exhibit 4 is a copy of a letter written by Mr. Woldson to the Commissioners of Drainage District number 1, under date of January 26, 1940, but object to it on the ground that it is immaterial.

Mr. Whitla: I offer plaintiff's exhibit 4, being a demand on these defendants to drain this land.

[95]

Mr. Wilson: Counsel's statement is correct as to what the instrument is.

The Court: Objection overruled. Admitted.

(Testimony of John Davidson.)

PLAINTIFF'S EXHIBIT No. 4

Admitted Nov. 21, 1941

Martin Woldson

646 Peyton Building

Spokane, Washington

January 26, 1940

S. M. Bauman, Chairman,
John Davidson, Secretary,
Roy E. Copeland, Commissioner,
Drainage District No. 1,
Bonners Ferry, Idaho.

Gentlemen:

At various times I have drawn attention to the necessity of cleaning out the ditch from the Spokane International Ry. track to the booster pump. This ditch has been accumulating silt which at the present time covers the pipe running through the dike built across the ditch at the booster pump, thus preventing any chance of the water draining away from the ditch coming down to the booster pump, without the use of the pump. By lowering this ditch to the bottom of the pipe placed in this embankment, it is possible that the use of the booster pump could be suspended for the period that the Kootenai Power & Light Company has agreed to lower the lake to zero of the Nelson gauge, which will be April 1 this year. After April 1 next it will require some time before the lake is raised

(Testimony of John Davidson.)

sufficiently to permit the water to back up and raise the river into the present outlet of the ditch in District #1.

If the above work had been performed before this time, I am of the opinion that the booster pump could have been turned off, thus creating a saving of \$125.00 or more per month. The cost of cleaning out the above ditch should not exceed \$300.00 or \$400.00.

Now, in regard to the booster pump of District #1, it is my opinion that in the event of a freshet which would compel the use of the heavy motor to keep the district properly drained in the vicinity of Mirror Lake, it is impossible to say how long the present pump could be operated without a breakdown. For that reason I believe it is absolutely necessary to have an auxiliary pump ready to take care of such an emergency. Last fall a Pomona pump was installed in Drainage District No. 2 and same was found highly satisfactory. By installing a similar pump in District No. 1, I believe a considerable saving in the cost of power could be [390] made by using the new pump and keeping the old pump, now being used, in repair, to be used for emergencies.

Section 41-25-39 of the Idaho Codes Annotated, in providing the general power of commissioners of drainage districts, says among other things:

“to build and maintain drains, canals, sluices, bulkheads, water gates, levees and embankments; to

(Testimony of John Davidson.)

establish and maintain pumping plants and to construct and maintain and keep in repair all works requisite and necessary to the end that the lands in the district may be reclaimed.

By this section of the statute it is made your duty to maintain all of the works within your district, and to carry them on to the end that the land shall all be reclaimed. As I am paying the taxes and assessments within the district for that purpose, I will have to insist upon this being done.

You have furnished bonds for the performance of your duties, which also include a strict accounting of all warrants issued by you on behalf of the district, and showing for what purpose. I want to be reasonable and work amicably with you, but in view of the large investment I have in the land there, I must insist upon a strict compliance with the law, and that the ditches be maintained in a proper manner in all parts of the district; that the pumping plant be kept in adequate condition; and that the entire district be kept in proper repair in order that all the land can be properly reclaimed.

Yours respectfully,

MARTIN WOLDSON

MW-MB [391]

Q. When you got that letter was there any action of the Board taken on that.

The Court: I wish you would look those things up at noon.

(Testimony of John Davidson.)

Mr. Whitla: They didn't produce the books for us so that we could have these things.

The Court: Just make a note of the things you want this witness to look up so that he can get them all at noon.

Q. Mr. Davidson, look up the records of all of your minutes from the first of January 1940 on down covering this matter and letters that Mr. Woldson wrote to you or the commissioners regarding this matter. A. From January 1.

Q. Yes, January 1, 1940.

Q. Did Mr. Woldson appear before your board relative to getting you to drain this land?

A. I am quite sure, but I wouldn't say whether there is a record of it or not.

Q. You didn't make a record of all the people appearing before you? A. No sir.

Q. Do you remember whether he appeared before you requesting [96] the drainage of this land?

A. Yes sir.

Q. How many times?

A. Time and time again.

Q. Just give the dates as near as you remember.

A. I cannot give dates.

Q. Now, after you received the letter from him and after this resolution of May 18, was passed, you had a meeting relative to that?

A. Yes, there was a meeting the 24th of May 1940.

(Testimony of John Davidson.)

Q. I ask to have this marked as Plaintiff's exhibit 5, and then ask you if that is the minutes of that meeting. A. Yes.

Judge Hunt: We have no objection to this except that there is a correction in pen and ink put in there by Mr. Davidson.

Q. There appears to be a correction in pen and ink, will you read that statement to show what it is.

A. Just the correction.

Judge Hunt: Doesn't it say "or other expenses"

A. "or expenses"

Judge Hunt: Isn't the word "other" in there?

A. No.

Mr. Whitla: We offer plaintiff's exhibit [97] number 5 in evidence.

Judge Hunt: No objection.

PLAINTIFF'S EXHIBIT No. 5

Admitted Nov. 21, 1941.

Minutes and Records of Drainage Dist. No. Boundary County, Idaho.

Commissioners of Drainage Dist. No. 1, meet on this 24th of May 1940.

All Commissioners being present.

Meeting called by the chair in regard of a letter received from Mr. Martin Woldson a copy of same is hereto attached. And answered in regard the same as follows:

(Testimony of John Davidson.)

This is to notify you that we as Commissioners of Drainage Dist. No. 1 will not be responsible for any ditching you are ordering in or other expenses connection of same, said Resolution made by S. M. Bauman and second by Roy Copeland.

Carried.

A Bill presented by Mr. E. S. Rowels for auditing the Drainage Dist. No. 1 books for \$195.00 was allowed and ordered paid.

There being no more business the meeting adjourned.

Commissioners

S. M. BAUMAN,
JOHN DAVIDSON.

Q. Following that do you know whether Mr. Woldson did anything toward cleaning out the ditches?

Judge Hunt: Objected to as incompetent, irrelevant and immaterial. If he did that on his own hook, voluntarily, that certainly would not have anything to do with the District.

The Court: Overruled, he may answer. I don't think the Court ruled on that last exhibit, so the record may show it is admitted.

Q. Mr. Woldson proceeded to go ahead and clean out the ditches.

Q. What equipment did he use.

A. He was using a dragline.

(Testimony of John Davidson.)

Q. Who was the dragline operator.

A. Ed Horman was operating it at that time.

Q. How wide is the main lateral ditch through Mr. Woldson's land.

A. There is different widths on different ditches.

Q. The main lateral that cuts along the north line of the land in controversy here.

A. I presume about four feet.

Q. You mean deep, don't you?

A. Yes sir.

Q. How wide is it at the bottom and at the top?

[98]

A. I would think about eight or ten feet wide at the bottom.

Q. Now, Mr. Davidson, in the ordinary work of cleaning out this main lateral ditch what does the District use?

A. Dragline.

Q. That is generally considered the proper method of cleaning out these ditches?

A. It is the only way we can do it.

Q. Was Mr. Farnum or Littlefield operating that in the Summer of 1940?

A. Mr. Farnum.

Q. Who did the work for the District in the fall of 1939?

A. Farnum.

Q. What did the district do relating to paying for Mr. Farnum's work in the fall of 1939?

A. The District issued warrants.

Q. How long was he in making collection from you. When did you make payment?

(Testimony of John Davidson.)

Judge Hunt: Objected to as immaterial and not binding upon these defendants.

Mr. Whitla: Mr. Bauman didn't pay these men in 1939, they had to wait until 1940.

Judge Hunt: Objected to as immaterial, it is not an obligation of this plaintiff's and these men all got their money.

The Court: Why is this material.

Mr. Whitla: To show that they tried to [99] stop men from doing the work.

The Court: It may be admitted.

Q. How long did he have to wait for his money?

A. I can't say but the work he done for the District I am sure it wasn't cash.

The Court: We will recess until 1:30.

1:30 O'clock P. M. November 21, 1942.

Mr. Whitla: May I make demand to produce the minutes of the Commissioners for Drainage District number 1, for the 7th of March 1928; the 21st of June 1928; the 30th of July 1925; the 25th of November 1927; for the 8th of February 1928; the 7th of March 1928; the 6th of September 1928; the 7th of September 1928; the 17th of October 1928; the 27th of November 1928; the 2nd of March 1929; the 9th of August 1929; the 29th of August 1930; the 27th of March 1930; the 29th of October 1932; the 30th of October or the 31st of October 1930; the 11th of December 1930; the 4th of April 1931 and the 1st of July 1932.

(Testimony of John Davidson.)

The Court: I presume it will take him some time to get those.

Q. Turn to the record of the meeting of November 27, 1939 and say whether or not Mr. Farnum's bill for dragline was allowed or rejected.

Judge Hunt: I object to this as incompetent, [100] irrelevant and immaterial and has no bearing on the issues here.

The Court: I understood counsel to say that it wasn't offered for the purpose of showing any liability on the part of the defendants.

Q. Did you find a bill there for dragline \$357.56 for Mr. Farnum? A. Yes sir.

Q. What is the fact as to whether Mr. Farnum's bill for cleaning the ditches with the dragline was allowed or rejected at that meeting?

A. It is stated here that Farnum was ordered paid,—no, it is rejected.

Q. What about the bill of Gilbert Barlow?

A. Also rejected.

Q. Does it show in May 1940 these bills were again called up and what was done? Were these bills brought up again on May 7, 1940?

A. They were brought up again.

Q. Was there any amount paid on them?

A. Yes.

Q. What was paid on them?

A. The following allowed Ed Farnum \$223.18; McDonald and McDonald \$288.95; Gilbert Barlow \$115.00.

(Testimony of John Davidson.)

Q. Do you know why they didn't pay them in full? A. I don't recall right now. [101]

Q. I will ask you if it wasn't a fact that the bills were placed in the hands of Solon Clark and that he threatened suit before you paid anything on them?

Judge Hunt: Objected to as leading.

The Court: Sustained.

Q. You have testified to the effect that on various occasions Mr. Woldson had the question of the drainage of this land up before the Commissioners. Calling your attention to the minutes of the meeting of August 17th 1933 I will ask you if Mr. Woldson had up with you, at that time the matter of the drainage of Mirror Lake?

A. Yes sir, that is correct.

Q. Do you remember what the Board desired on that occasion of Mr. Woldson?

A. Here is a statement——

Q. ——I will ask this, did you want Mr. Woldson to cash the warrants of the District?

A. Yes sir.

Q. I will ask you if on the 28th of August, 1933 you have a record of taking up with Mr. Woldson the question of whether he was willing to do that?

A. Yes, I do.

Q. What was he willing to do.

A. He said he would advance the money as I remember.

Q. Not to go back to all of the years, did you

(Testimony of John Davidson.)

have this [102] up with him at various times other than the time in 1940?

Mr. Wilson: We also object to this as leading, the witness states he cannot tell, that he can't remember.

The Court: Sustained in the form the question is in.

Q. In 1938, calling your attention to the minutes of June 28, 1938 was the arrangement or the question of cleaning the ditches again taken up?

A. It was ordered.

Q. Calling your attention to the minutes of August 25, 1928 you may state whether or not the Commissioners made an inspection of the work being done at that time?

A. Yes, we made an inspection.

Q. What did you find as to the work, how it was being carried on at that time?

A. It seemed to be satisfactory.

Q. Now, Mr. Davidson, calling your attention to the 14th of September 1939, did you do anything, —what did you do relative to that matter at that time?

A. We had a meeting for settling the bills.

Q. The bills in regard to the work on Mirror Lake?

A. Yes sir.

Q. And again on August 18, 1939 did you take up the matter again? [103]

A. This meeting was called for the purpose of deciding what was to be done, and he answered and

(Testimony of John Davidson.)

said that he was not in the construction business, there was a motion made by Richmond that he clean up the main ditch——

Judge Hunt: ——Is that the meeting of August 18th, 1939, Mr. Davidson?

A. Yes sir.

Q. You had the matter up with Mr. Woldson of trying to get him to bid on construction work?

A. Yes I did, yes sir.

Q. The minutes of February 5, 1940, I call your attention to those minutes to which a certain amendment was added, this amendment was offered by Mr. Bauman that the drainage District number 1 would do no more work in Mirror Lake laterals from then on. Did Mr. Bauman make that resolution at that time.

A. It was made by Mr. Bauman.

The Court: What was done with that resolution?

A. It was carried.

Q. I will ask you whether or not a meeting of May 7,—no August 10, 1940, if there is anything regarding a letter from Mr. Woldson in regarding to cleaning the ditches.

A. Yes the meeting of August 10, 1940, a letter from Mr. [104] Woldson in regard to cleaning the main ditch was read. The same was ordered done provided Mr. Woldson would cash the 1941 maintenance warrants.

A. Mr. Woldson would not cash the 1941 maintenance warrants would he?

(Testimony of John Davidson.)

A. I could not say at this time. I don't remember.

Q. I asked you about some letters this morning and you did not have them. Did Mr. Woldson write you in January 1940 giivng you data on the condition of the water shown by the gauge and what was the experience in starting the pumps and getting the water out of Mirror Lake?

A. He did yes sir.

Mr. Whitla: I am having this marked as exhibit 6. Now I will offer it in evidence.

Judge Hunt: We object to this as immaterial. This is a statement relative to the elevation of Kootenai River.

Mr. Whitla: And the effect of it on getting the pumps to work.

The Court: Overruled, it may be admitted.

PLAINTIFF'S EXHIBIT No. 6

Admitted Nov. 21, 1941

Martin Woldson
444-5 Peyton Building
Spokane, Washington

January 11, 1940

Mr. John Davidson, Secretary,
Drainage District No. 1,
Bonners Ferry, Idaho

Dear Sir:

This is a statement showing the elevations of the river from April 26, 1939 to January 10, 1940. These

(Testimony of John Davidson.)

elevations were taken from the gauge on the pier of the bridge over Kootenai River at Bonners Ferry:

Apr. 26, 1939	10.0'	Aug. 21, 1939	4.0'
May 2, 1939	16.2'	" 29, "	4.0'
" 9, "	14.2'	Sept. 5, "	3.8'
" 16, "	17.1'	" 9, "	3.8'
" 22, "	17.1'	" 18, "	3.6'
" 23, "	16.9'	" 25, "	3.5'
" 30, "	17.6'	Oct. 2, "	2.8'
June 6, "	13.8'	" 7, "	3.5'
" 13, "	12.0'	" 10, "	3.6'
" 20, "	14.3'	" 18, "	3.4'
" 27, "	14.2'	" 24, "	4.5'
" 28, "	13.8'	" 31, "	4.4'
July 7, "	13.2'	Nov. 7, "	4.2'
" 18, "	9.5'	" 17, "	3.9'
" 25, "	7.5'	" 26, "	3.7'
Aug. 1, "	6.0'	Dec. 4, "	3.6'
" 4, "	5.0'	" 11, "	4.5'
" 9, "	4.0'	" 20, "	3.7'
" 15, "	4.7'	" 27, "	3.0'
		Jan. 1, 1940	2.6'

On March 23, 1939 we started to pump out the water gathered in old Mirror Lake and on March 28, 1939 the lake was out at 9:00 that morning which shows that it took only six days to pump away this water. On account of having a very dry spring last year, the water there did not accumulate as fast as sometimes in the past.

You will note that the high water mark was on May 30th last year and it continued high to the present time. For that reason I believe that we

(Testimony of John Davidson.)

should be reimbursed for our expense from May last to the present time.

Yours very truly,

MARTIN WOLDSON

MW-B [393]

Mr. Whitla: I will have this marked as plaintiff's exhibit 7 and offer it in evidence.

Judge Hunt: We don't think it is material, but other than that we have no objection.

The Court: Admitted. [105]

PLAINTIFF'S EXHIBIT No. 7

Admitted Nov. 21, 1941

Martin Woldson
444-5 Peyton Building
Spokane, Washington

Sept. 4, 1940

Mr. S. M. Bauman, Commissioner,
Mr. Roy Copeland, Commissioner,
Mr. J. Davidson, Secretary,
Drainage District No. 1,
Bonners Ferry, Idaho

Gentlemen:

About August 20th I called Mr. Copeland's attention to the slides that occurred after the dragline had finished cleaning out the ditch from the pump

(Testimony of John Davidson.)

house south towards the Great Northern trestle. In our conversation Mr. Copeland thought that the slides could be opened up by men cleaning out the ditch sufficiently so as to allow the water to come down to the grade level of the ditch. Yesterday, Sept. 3rd, I went over the ditch and found that no work had been performed and neither had any been done today, 4th. There are three springs, one located about 50 ft. back in the field from each slide, and in order to prevent further sliding, I would suggest that a ditch be dug say about 3 ft. or 4 ft. deep connecting the spring with the ditch. This ditch could be filled with poles and slabs and covered over so as to allow the water to have free passage out to the main ditch and at the same time not interfere with the working of the ground.

On Sept. 3rd I found that the booster pump was not operating and it also was idle today, 4th. The water had raised to a considerable height and was backing up. I therefore found that it would be useless for me to proceed further with the dragline to clean out the ditches unless you commissioners arranged to keep the water sufficiently low in the ditches so as to drain this part of the land which I am trying to reclaim.

Now, in regard to the booster pump and motor. I have been at the pump house from time to time and I find that the belt is rubbing against the stud-ding or against parts of the motor. I have called

(Testimony of John Davidson.)

attention to this fact before, but apparently it has been overlooked. Yesterday when the pump was idle I had an opportunity to examine it and found that the belt is almost completely worn out from this constant rubbing. It appears to me that the man who looks after the pump house is ignorant of mechanical requirements, otherwise he would adjust the belt to avoid its wearing out.

If something along the above lines is not followed, the slides will continue blocking the ditch and the material will keep floating down and filling up the entire main ditch. I believe the only way to remedy the situation is to follow the suggestions I have made herein, or if you have other steps to follow I will be pleased to see something done promptly.

Kindly let me have your views on the above matters.

Yours very truly,

MARTIN WOLDSON

MW-B [394]

Mr. Whitla: This will be marked as plaintiff's exhibit 8 for identification.

Judge Hunt: It has not been identified by the witness, and is a carbon copy, we object to it—

Mr. Whitla: I haven't asked about it yet.

Q. I ask you if that is a copy of a letter that was sent to all the Commissioners and ask you if

(Testimony of John Davidson.)

you received one? A. This is a copy.

Q. You received one. A. Yes.

Q. That was taken from your minutes?

A. Yes sir.

Q. Was it in the same condition as it is now, except that it is now marked exhibit 8?

A. Yes sir.

Mr. Whitla: We now offer this in evidence.

The Court: It may be admitted, there seems to be no objection.

PLAINTIFF'S EXHIBIT No. 8

Admitted Nov. 21, 1941

Martin Woldson
646 Peyton Building
Spokane, Washington

Nov. 30, 1940

Mr. S. M. Bauman, Chairman,
Mr. Roy Copeland,
Mr. John Davidson, Secretary,
Commissioners D. D. #1,
Bonners Ferry, Idaho

Gentlemen:

In accordance with our previous correspondence, I am enclosing a statement showing the total costs of the work performed by me in District #1 in the drainage and maintenance of said land which has not been drained by you as you are required to do.

(Testimony of John Davidson.)

This bill represents the actual work done to date, in other words, showing the money I am actually out of pocket on this job. This does not include any of my time and expenses in going upon the work, laying it out and superintending it, which I feel I am also entitled to, but which I will waive providing settlement is made per the enclosed bill and in accordance with the terms expressed in the last paragraph of this letter. I am handing you this bill for payment as I am contending it is not only a valid claim against the district, but also against each commissioner who refused to have said work done.

I shall expect settlement for this work in full on or before the 15th of December, 1940, and will appreciate your attention. This is not waiving my claim for the use of the land for the past years, nor is it waiving my claim for any additional work I shall have to do for the maintenance of this land and which you have not done as you are required by law to do,

Yours very truly

MARTIN WOLDSON.

B

Encl [395]

(Testimony of John Davidson.)

MARTIN WOLDSON
444-5 Peyton Building
Spokane, Washington

Nov. 25, 1940

STATEMENT OF COST OF WORK PERFORMED BY MARTIN
WOLDSON IN DRAINAGE DISTRICT #1, BOUNDARY COUNTY,
IDAHO, SUMMER AND FALL OF 1940.

1940

7/22	C. F. Littlefield, dragline labor 7/1 to 7/13.....	\$ 115.00
"	T. Lozier, dragline labor 7/1 to 7/13.....	59.80
"	Union Iron Works, 55' 5/8" cable.....	6.77
"	Union Iron Works, 75' 5/8" cable.....	9.23
7/12	Howard-Cooper Corp., jaw clutch for dragline.....	22.60
7/20	Howard-Cooper Corp., traction shaft.....	37.80
"	Motor Coach Terminal, freight on shaft.....	.45
7/3	T. Lozier, dragline labor 7/15 to 7/31.....	97.50
"	C. F. Littlefield, dragline labor 7/15 to 7/31.....	162.50
7/10	Union Iron Works, 45' 5/8" cable, and freight.....	7.04
7/12	C. F. Littlefield, dragline labor 8/1 to 8/9.....	82.50
"	T. Lozier, dragline labor 8/1 to 8/9.....	46.90
7/14	McGlocklin-McDonald, dragline rent, July & 8/1 to 8/9	237.00
"	Boundary Farmers Supply, gas, oil, grease.....	171.65
7/5	Meeker's Machine Shop, supplies for dragline.....	3.60
7/14	Boundary Farmers Supply, gas & oil.....	10.80
7/10	C. F. Littlefield, dragline labor, 9/2 to 9/4.....	25.00
"	T. Lozier, dragline labor, 8/2 to 9/4.....	14.50
7/14	McGlocklin-McDonald, rent dragline 9/2 to 9/4.....	20.00
7/7	Oscar Davis, hauling mats, skidding, etc.....	43.00
7/29	C. F. Littlefield, dragline labor, 10/18 to 10/26.....	75.00
"	T. Lozier, dragline labor, 9/2 to 9/4.....	14.50
7/21	Union Iron Works, 80' 5/8" cable.....	9.84
"	North Idaho Freight, freight on cable.....	.50
7/6	C. F. Littlefield, dragline labor 10/28 to 11/2.....	53.75
"	T. Lozier, dragline labor 10/28 to 11/2.....	31.45
7/9	McGlocklin-McDonald, rent dragline, 10/18 to 11/2.....	97.00
7/12	Boundary Farmers Supply, gas, oil, grease 10/19 to 11/2	63.50
"	Meeker's Machine Shop, hardware & parts.....	7.23

\$1554.91

(Testimony of John Davidson.)

Less gasoline refund State of Idaho			
9/12	750 gals.	\$37.50	
11/25	300 gals.	15.00	52.5
		Net Cost	\$1502.4
		[396]	

Q. The commissioners have never paid any part of those expenses? A. No sir.

Q. How long have you personally been familiar with this land referred to as the Mirror Lake District? [106]

A. Almost from the time I came to Bonners Ferry.

Q. Was that in 1925?

A. I became Commissioner in 1925.

Q. When did you come to Bonners Ferry?

A. In 1920.

Q. In regard to this land what has been its condition—strike that,—state whether or not there was any change in this land from 1939 to the present time. A. What land do you refer to.

Q. The land in controversy. On the south side of the main lateral ditch, belonging to Mr. Woldson.

A. Yes sir, there has been.

Q. In what regard.

A. It has been improved in this regard. Been getting a little drier every year.

Q. With regard to the condition, beginning with the time after the slides were taken out in 1940, what about its condition then?

(Testimony of John Davidson.)

A. It has been getting better a little bit.

Q. Prior to the year 1940 had that been in a condition to be plowed at all?

A. Small patches.

Q. In 1940 after the slides were removed could it be plowed?

A. Some part of it was plowed.

Q. Do you know how many acres was plowed after that? [107]

A. It is hard to say, approximately I would judge between 90 and 100 acres. It is just a rough estimate.

Q. There is all together in this tract about 220 acres? A. Yes sir, about that.

Q. Do you know any reason, if the slides are kept out of those ditches and the ditches opened up, that this land would not drain so that all of the land can be plowed and put into crops, made good farm land?

A. The condition,—to begin with, in that area it had all been lake bottom and it took considerable time for it to drain.

Q. It takes time to drain you say.

A. Yes sir.

Q. Year after year what is the condition as to its getting better or remaining the same?

A. It is improved.

Q. How much of all of this land of Drainage District number 1 was lake bottom besides this tract? A. It was a large part.

(Testimony of John Davidson.)

Q. Was there any other lake besides Mirror Lake? A. Fry Lake.

Q. Where these slides occur is there any method you have adopted to hold out the dirt where the dirt is soft and slides occur?

A. We adopted the method that we had on three or four other places, but at this particular place we never did, [108] that was sheet piling we used.

Q. How much did you do with this piling?

A. At one other ditch we put in two stretches.

Q. And how long were they?

A. About seven or eight hundred feet to each stretch.

Q. Is there any other place where you used it?

A. Another place in the upper part of the District by Mr. Bauman's.

Q. That is on Bauman's land. A. Yes sir.

Q. How much is there on Bauman's?

A. Maybe 150 or so feet.

Q. Turning to your record of June 21, 1928, I will ask you if there was any resolution authorizing sheet piling to be used in this District, on this land in Mirror Lake territory?

A. There has been a resolution.

Q. Mr. Whitla: I offer this resolution and ask to have it marked as plaintiff's exhibit 9.

Judge Hunt: We have no objection.

The Court: Admitted.

(Testimony of John Davidson.)

PLAINTIFF'S EXHIBIT No. 9

Admitted Nov. 21, 1941.

Minutes of Meetnig of the Commissioners of Drainage District No. 1, Bonners Ferry, Idaho.

The Commissioners of Drainage District No. 1, held a meeting on the 6th day of September 1928.

The Commissioners present were: A. B. *Ash*, Frank Zimmerman and John Davidson.

Minutes of the previous meeting were read and approved.

Motion was made by Commissioner Zimmerman, seconded by A. B. Ashby that the motion made at the previous meeting, held June 21st, 1928, be omitted in regard to driving sheet piling where necessary in Mirror Lake and that a new ditch be dug where the ground is firm enough to stand without any extra sheet piling.

Carried.

Meeting adjourned.

JOHN DAVIDSON,

Sec. [397]

Q. Was the sheet piling authorized in that resolution ever used? A. No sir, it was not.

Mr. Wilson: For the purpose of the record I call attention to the fact that the minutes of the meeting [109] show a resolution which says they would not put in the sheet piling but would put in

(Testimony of John Davidson.)

ditches where necessary, this is the one where they decided not to put in the piling.

Mr. Whitla: June the 21st is the one where they authorized to put in the piling and then they attempted to change it. I handed in the wrong one.

Q. Calling your attention to this on June 21, 1938, "motion made by commissioner Ashby, seconded by Commissioner Zimmerman, that the District buy lumber and drive sheet piling in Mirror Lake where necessary, carried." that's right.

Q. Was this the minute of that meeting.

A. Yes.

Mr. Whitla: We offer this in evidence and ask to have it marked as exhibit 10.

Judge Hunt: No objection.

The Court: Admitted.

PLAINTIFF'S EXHIBIT No. 10

Admitted Nov. 21, 1941

Minutes of the Meeting of Commissioners of Drainage District No. 1 Boundary County, Idaho.

The Commissioners of Drainage District No. 1 held a meeting on the 21st day of June, 1928.

The question of an assessment for a pipeline along the right of way of the district along the dyke was brought up and a resolution passed. The resolution is hereto attached:

(Testimony of John Davidson.)

Motion was made by Commissioner Ashby, seconded by Commissioner Zimmerman, that the district buy lumber and drive sheet piling in Mirror Lake where necessary, carried

The following bills were read and allowed.

Martin Woldson warrants No. 242, 243, 244, and 245 for purchasing material and labor in accordance with Court Order.....	\$4,000.00
Continental Oil Co., Gas & Oil.....	212.43
Warrants to Martin Woldson for purchasing material and labor in accordance with Court Order, warrants Nos. 247, 248, 249, 250, 251, 252, 253, 254.....	7,000.00
Continental Oil Co., Gas & Oil.....	173.47
Martin Woldson, Warrant to pay for material and labor Warrants No. 256, 257, 258	3,000.00
B. F. Lumber Company, lumber used in ditching	85.76
Martin Woldson, warrants to pay for material and labor in accordance with Court order	2,000.00
<hr/>	
Total	\$16,471.66

Meeting adjourned at call of the chair

JOHN DAVIDSON,

Sec. [398]

(Testimony of John Davidson.)

Q. That is the resolution, and then the one of September 6, is the one referred to as trying to revoke the one of June 21, is that right?

A. Yes sir.

Q. Now, something was said about this main lateral ditch, tell us how much land this main lateral ditch actually drains? [110]

A. The main lateral drains more than three-fourths of the District. There is a lateral, a second lateral that goes into Fry lake that drains the balance.

Mr. Whitla: May we agree that this map marked exhibit 11 is a substantially correct map of the district?

Judge Hunt: We will stipulate that exhibit 11 substantially shows the drainage district.

Q. Now, Mr. Davidson, will you step over here. This main lateral ditch that we have been talking about comes down between what is shown here in green as the Ralph Richmond land and in grey which is designated as the Jacob Booher land,—first, upon this map shown in Red is the Simon McDonald land, and in green the Richmond land and in Grey the Booher land, this main lateral runs along the McDonald land and then turns north between the McDonald and the Richmond land and runs about half way of the McDonald land and then turns east and then north again and goes north clear through the Bauman land,—I mean the Richmond land through the S & I right-of-way.

(Testimony of John Davidson.)

A. That is correct.

Q. The land in controversy is the land south of Simon McDonald's and to the east of Simon McDonald's? A. Yes, that is correct. [111]

Q. Is there a foot hills ditch that runs close to the Great Northern tracks?

A. The foothills ditch runs along here (indicating).

Q. The so called laterals run into the main ditch?

A. Connecting with the main ditch on the outside?

Q. In regard to the land southeast of the Great Northern. The land between what is shown as the center of Section 4 on the map on South and west, what is the character of that land as to being level or rising? A. It is level.

Q. And after it strikes the Great Northern.

A. It rises.

Q. This ditch is along the outside.

A. That catches the water coming in from the hillside.

Q. To the east of this land where the Great Northern runs, how does it run on the hillside or what?

A. Part on a trestle and part on a fill.

Q. Is there some ditch or ditches under the tracks that drains the land on the east.

A. Some ditches underneath the trestle.

(Testimony of John Davidson.)

Q. Could you tell us how long that ditch referred to as the main lateral ditch is?

A. That is several miles, approximately six miles long.

Q. On this land that was broken in 1940, was there any crop raised this year? [112]

A. A pretty good crop in there.

Q. Who had that in crop?

A. Oscar David.

Q. He is your brother. A. Yes sir.

Q. When you came to this country you kept the son on your name and he dropped it?

A. Yes sir, when we were made citizens.

Q. What crop was that in this year?

A. Mostly in oats and Barley.

Q. How long have you been farming in that district? A. In District one.

Q. Yes. A. Since 1920.

Q. Can you estimate approximately the amount of crop growing on that land from your experience.

A. The crop valuation.

Q. Can you give an estimate of a crop when you look at it, the amount?

A. Yes, I think I can.

Q. Tell us how much oats would run on that land this year?

A. It would be approximately.

Q. That is all we want.

A. I would say seventy or eighty bushels, that is all I could do, and it would be an estimate. [113]

(Testimony of John Davidson.)

Mr. Whitla: That is all, at this time. You may examine.

Cross Examination

By Judge Hunt:

Q. In 1934 when Mr. Woldson took up with the Commissioners of Drainage District number 1 the matter of certain laterals in Mirror Lake, you were a Commissioner? A. Yes sir.

Q. State whether or not Mr. Bauman and Mr. Copeland were Commissioners at that time in 1934. Can you tell from memory?

A. I haven't much of a memory.

Q. Well, look it up. I think the date, or one date, was the ninth of August.

Mr. Whitla: We will admit they were not.

A. The second day of August 1934, the Commissioners at that time was Ralph Richmond, John Davidson, and P. T. Casey.

Q. I will ask you whether or not in 1940, when Mr. Farnum did certain work that you testified to, did you also as Commissioner refuse to O. K. these Bills. A. I have a record on it.

Q. You stated that the Commissioners Bauman and Copeland refused to O. K. the Bills, did you refuse to O. K. that as Commissioner? [114]

A. I would have to go back to the records.

Q. Well, go to the records and see if you also voted against paying these bills?

A. That was in 1940.

(Testimony of John Davidson.)

Q. 1940, certain work you testified to which was done by Mr. Farnum.

A. Was that in January,—I did not vote on that.

Q. Did you vote not to pay.

A. I didn't vote on that, they were voted down and I didn't vote.

Q. You didn't vote yes or no. A. No sir.

Q. You didn't tell the other commissioners at that time that they should be paid did you?

A. I don't remember.

Q. The work you referred to in November 1939, where the Commissioners refused to O. K. payment of the warrants, who authorized that work to be done, if anyone?

A. When we got the machines in there we done our own work, cleaning out the main ditch first.

Q. I will ask you if it is not a fact that these bills that you turned down were bills incurred by Martin Woldson and not bills incurred by the Commissioners of the District?

A. That is a fact. [115]

Q. The Commissioners did not incur these bills?

A. No sir.

Q. Did you have certain meetings with Mr. Woldson relative to the payment of these bills?

A. Mr. Woldson was notified to the effect.

Q. Mr. Woldson demanded that the District pay the bills that he had incurred? A. Yes sir.

(Testimony of John Davidson.)

Q. At first the Commissioners refused to pay them? A. Yes sir.

Q. I will ask you if later on the Commissioners approved payment of one-half of the bills?

A. I think the record shows we did.

Q. These bills O. K. and itemized one by one, those were the bills that you were referring to?

A. As paid.

Q. You paid one-half of them, or the District did.

A. I don't think we paid one-half of the bills. I think the bills that were paid were paid in full.

Q. You paid one-half of the bills incurred by Mr. Woldson. A. I cannot say.

Q. As a matter of independent recollection, later on you agreed to pay one-half if Mr. Woldson would pay one-half of them?

A. I would have to go back to the warrant stubs to identify them. [116]

Q. You had an argument with Mr. Woldson about the bills that he created? A. Yes sir.

Q. And these bills were later paid.

A. Yes sir.

Q. Isn't it a fact that Drainage District Number 1 paid one-half of these bills, after an agreement with Mr. Woldson?

A. I cannot answer that.

Q. Did the District pay all of the bills?

A. All of the bills that were passed upon.

Q. Did Mr. Woldson pay half or any part?

(Testimony of John Davidson.)

A. Mr. Woldson paid all of the bills from that time on.

Q. Bills that you referred to in the meeting of November 27th 1939, that the Commissioners refused to pay, state whether those accounts had been authorized by the Drainage District Commissioners.

Mr. Whitla: Objected to as calling for a conclusion of the witness.

The Court: Overruled.

Q. Isn't it a fact that the bills you testified to from the minutes of November 27, 1939, being bills disallowed by the Commissioners. Isn't it a fact that none of those bills were incurred upon order of Drainage District Number one, commissioners?

[117]

A. It doesn't show they have been paid.

Q. You testified that on November 27, 1939 the Commissioners refused to pay.

A. That's right.

Q. Isn't it a fact that these were not incurred by the Commissioners and that was the reason you turned them down?

A. They were for work done by the dragline after certain commissioner refused to O. K. the bills.

Q. And was it Mr. Woldson who authorized the work? A. Yes sir.

Q. In May 1940 the matter was again brought up and the district paid one-half those bills.

(Testimony of John Davidson.)

A. The commissioners meeting called for the purpose of making some adjustment in regard to labor down at the Mirror Lake district in the fall of 1939 shows the following bills allowed——

Q. —My question was, whether or not the Commissioners paid half of the bills?

A. According to our minutes we paid it all.

Q. According to your independent recollection isn't it a fact that the Commissioners finally agreed to pay one-half of the bills incurred by Mr. Woldson?

Mr. Whitla: Objected to as the figures do not show that half of the bills were paid—— [118]

A. —It shows the bills paid were E. Farnum \$223.18,——

Q. —Mr. Davidson, my question was, didn't the district agree to pay half of the bills incurred by Mr. Woldson.

A. It looks to me that they paid them all.

Q. Did Mr. Woldson later do some work to make up the payment of those bills.

A. There was some more work done in there.

Q. You testified to a meeting under date of August 1933. I think it was August 17th, 1933, in which you said that Mr. Woldson would not put up any more money.

Mr. Whitla: He said that they were to write to Mr. Woldson.

The Court: He may answer that question yes or no.

(Testimony of John Davidson.)

Q. Did Mr. Woldson about August 1933 refuse to put up any more money?

A. It was decided to write to Mr. Woldson in regard to getting money.

Q. Up to that time all the money you used at that time you were getting from Mr. Woldson?

Mr. Whitla: We object to that it is immaterial how they got the money.

Judge Hunt: It is preliminary.

The Court: Overruled.

Q. State whether or not about the year 1933 the District [119] got its money to do its maintenance work from Mr. Woldson? A. That's right.

Q. When did Mr. Woldson refuse to put up any more money? A. I don't remember.

Q. Was it about 1933.

A. I cannot say now because I would have to get it from the records.

Q. I will ask you if it was about the time Mr. Richmond and Mr. Casey became members of the Board? A. I would not say.

Q. Did you do this work in 1933?

A. We started in the fall, in August.

Q. And did you quit about August too? I will ask you if about that time you didn't get a dragline from Dainage District number 11, and move it over to do that work?

A. On the 9th of September we had a meeting——

(Testimony of John Davidson.)

Q. Mr. Davidson did you buy a dragline or rent one. A. We rented it at that time.

Q. Did you do any work with that dragline?

A. Yes sir.

Q. What did you do.

A. We proceeded to clean out the main ditch.

Q. Is that all you did.

A. I cannot say how far they went that fall, I got sick. [120]

Q. On June 29, 1938 Mr. Woldson took up with you the matter of cleaning up the main ditch. I will ask you whether you did clean the ditches out?

A. Yes sir.

Q. How many times since that time have the Commissioners caused the main ditches to be cleaned out? A. I don't remember.

Q. How many times a year do you run the dragline over there and clean out the ditches?

A. Some years it would be every year and some times it would go two or three years that we didn't do it.

Q. Isn't it a fact that some years you go over it twice?

A. That has been a small part where we had those slides.

Q. Where you have most of the trouble you go over it more than once a year?

A. It only happened once.

Q. And what year was that.

(Testimony of John Davidson.)

A. This year.

Q. 1941. A. Yes sir.

Q. How many times did you go over this main ditch in 1940? A. Just once.

Q. How many times did you go over the main ditch in 1939?

A. In 1939 it was once, if I remember right.

Q. What did you do on the laterals in 1939.

[121]

A. We started to go up there, we worked a part of the laterals.

Q. How did you do on the laterals in 1940?

A. Didn't do anything.

Q. Didn't do anything in 1940. A. No sir.

Q. What about 1941?

A. We haven't done anything, the district has not paid their bills.

Q. I will ask you Mr. Davidson, is it not a fact in the year 1940 that the laterals, the main ditches were twice that year cleaned out.

A. The main ditch.

Q. In 1940, last year that would be.

A. I don't remember really.

Q. Mr. Davidson, when I refer to the main ditch I refer to the main ditches in the vicinity of this low land? A. I know what you mean.

Q. You testified that in your meeting of August 10, 1940 a letter was read from Mr. Woldson relative to cleaning out the ditches and something concerning the financing thereof. Isn't it a fact that

(Testimony of John Davidson.)

about that time the District had no money with which to work on the ditches?

Mr. Whitla: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. On August 10, 1940 isn't it a fact that the District [122] was broke and had no money?

A. Some years our warrants have been accepted by the parties doing the work and have been taken care of by taxes.

Q. At this time isn't it a fact that no one would take the warrants?

A. I cannot say about that.

Q. About this time you were conferring with Mr. Woldson to get him to do some of the work and I will ask you if it isn't a fact that Mr. Woldson refused to take the 1941 warrants,—the warrants issued in 1940.

Mr. Whitla: That is objected to as incompetent, irrelevant and immaterial and not having any bearing on any issue here.

The Court: Overruled.

Q. Mr. Woldson refused to take these warrants?

A. I can't say because I don't remember.

Q. Mr. Woldson would not do the work?

Mr. Whitla: That is objected to, Mr. Woldson was not in the construction business, and this is not an issue in this case.

The Court: He may answer.

(Testimony of John Davidson.)

A. No sir.

The Court: Do you know, Mr. Witness, that Mr. Woldson refused to do the work?

A. Mr. Woldson told me he was not in the contracting business and it was up to us to do the work. [123]

Q. And he also said that he would not take the warrants if someone else did it?

Mr. Whitla: Objected to as repetition.

The Court: Go ahead, this is cross examination.

A. It seems to me that Mr. Woldson has been taking the warrants even if there has not been money at the County Treasury, but at that time these particular warrants I don't remember.

Q. In the last three years you have made some progress with that land have you not?

A. Yes sir.

Q. You have worked with Mr. Bauman and Mr. Copeland on this Board.

A. Yes sir.

Q. You all work in harmony.

A. Yes sir.

Q. You are in harmony with them now.

A. It is my principle to be in harmony with the board that I work with.

Q. And there are no battles or hard feelings?

A. No hard feelings, no.

Q. 1939 and 1940 were dry years.

A. Yes sir, they were dry years.

Q. Since 1938 you have made progress in draining that section of the District? [124]

(Testimony of John Davidson.)

A. Yes sir.

Q. State to the Court how the Commissioners have caused the pumping to be done in the last three years.

A. I don't understand.

Q. Do you pump night and day, or how do you pump?

A. You have reference to the booster pump.

Q. Whatever pumps you use in draining that land.

A. We have kept the pumps running for the benefit of the District.

Q. Do they run summer and winter.

A. At present, yes sir.

Q. Since 1938 have you run them in the winter as well as in the summer?

A. Yes sir.

Q. Every month during the year.

A. The last two years.

Q. How many hours a day do these pumps run, on an average?

A. I would judge at the present time about, well, in an ordinary season about a third of the time.

Q. Since 1938 how many hours a day on the average?

A. To be correct, it is a matter of record.

Q. Just your best judgment, would it be eight or sixteen hours a day.

A. I would judge about a third of the time, that is approximately, it is just an estimate. [125]

Q. You testified about slides occurring in the ditches.

A. Yes sir.

(Testimony of John Davidson.)

Q. Now going back to this other matter state whether prior to 1939 was it customary to run the pumps in the winter time as well as the summer?

A. We commenced in about 1939.

Q. Prior to that time you pumped during the spring and summer?

A. Most of it yes sir.

Q. When counsel stated that slides occur in the main ditch, that is not all that occurs in the main ditch to worry you, is it Mr. Davidson?

A. There is three or four soft spots in the ditch.

Q. Isn't it a fact that because of subterranean springs that bubble up all of the time you have those soft spots?

A. Something to that effect.

Q. And isn't it a fact also that those springs cause the main ditch and other ditches to fill up.

A. They give us trouble.

Q. Isn't it a fact that there have been periods of times that this end of the district was just an entire lake.

Mr. Whitla: We admit that it was all lake.

Q. Since the commencement of the District?

A. Yes sir.

Q. Approximately how many times since 1930 has that southern [126] end been submerged with water?

A. I cannot answer that question.

Q. You can't answer? A. No sir.

Q. Has it been more than once?

(Testimony of John Davidson.)

A. Several times it has been flooded.

Q. How deep does the water get over that area when it is flooded? A. Not very deep.

Q. Well, how many feet, on an average?

A. One or two feet.

Q. What happened to your ditches, both the main and lateral ditches on those occasions?

A. There has been slides in the ditches.

Q. After the water is pumped off what is the condition of the ditches?

A. Poor condition.

Q. Are they filled in? A. Filled in.

Q. Then you have to go and dig them out once more. A. Yes sir, clean them out.

Q. To be able to walk on some of this land how close together must the laterals be to get the water off sufficiently to walk upon the ground.

A. Quite close together. [127]

Q. Would it be fifty feet or a hundred feet?

A. I cannot answer that.

Q. What is customary in that area relative to the lateral ditches, one from the other?

A. Several hundred feet.

Q. Down here in this Mirror Lake area don't they put the laterals about a hundred feet apart?

A. There is more than that.

Q. Two hundred feet apart.

A. I presume something like that.

Q. How far are these laterals apart on the land of Mr. Woldson?

(Testimony of John Davidson.)

A. I cannot answer that.

Q. You have been over that land?

A. Yes sir, and there are some smaller laterals put in there by hand from time to time. I cannot say how far these large ones are apart.

Q. There are large laterals and small ones in between?

A. There are some large ones built by the drag-line and some small ones built by hand.

Q. These small ones are how far apart?

A. I cannot say.

Q. Those laterals and main ditches are often blocked by springs that bubble up and fill them up?

A. That is a fact with the laterals? [128]

Q. The main ditches blocked that way too?

A. One or two places.

Q. Isn't it a fact that those main ditches drain Fry Lake and the west central area and that that water flows south to Mirror Lake.

A. No sir, it goes to the main ditch west.

Q. Then there is another lake we call Mud Lake? A. Yes sir.

Q. And the drainage from that flows south to Mirror Lake? A. Yes sir.

Q. So that we not only have water from Mirror Lake but from Mud Lake? A. Yes sir.

Q. And in addition to that we have water that comes from the springs in the south end of the Drainage District? A. That is correct.

(Testimony of John Davidson.)

Q. Those springs in the Mirror Lake section, state whether or not they drain a lot of land that is south of the District, this hilly land?

A. You mean the water comes off the hills?

Q. Yes. A. I cannot say.

Q. There isn't any creek or other outlet for water from that section? A. No sir.

Q. Those springs bubble up year in and year out? [129] A. Yes sir.

Q. And the ditches fill in? A. Yes sir.

Q. Those springs might come up here today and over a little distance a little later. They move around.

A. Yes,—well I don't know that they move around, I cannot answer that, I don't know.

Q. Any way, they are there?

A. Yes, they are there.

Q. The water from Mud Lake flows south to Mirror Lake and all that water has to be pumped off? A. Yes sir.

Q. You testified that on September 6, 1928, the commissioners passed a resolution not to put sheet piling in the main ditch in the Mirror Lake Section?

A. Yes sir.

Q. Isn't it a fact that the Commissioners decided it would be more practical to construct another new ditch than to maintain the old one?

A. We did, yes sir.

Q. You did construct a new ditch about that time. A. We did, yes.

(Testimony of John Davidson.)

Q. You testified that the main lateral ditch was approximately six miles in length, what in your opinion would be its length by the time it gets to Mirror Lake, would [130] that be a half or more.

A. It would be more than half of it.

Q. More than half of this six miles of lateral gathers up water from the territory it serves prior to getting to Mirror Lake.

A. Yes sir, that is correct.

Q. The District comprises about four thousand acres? A. Four thousand some odd.

Q. What was that?

A. Some odd, I said, I think it is forty-four hundred and some odd acres.

Q. After the water gets to Mirror Lake would it flow out naturally?

A. No sir, it would not.

Q. In order to get the water out of Mirror Lake, —what have the Commissioners done to assist the water in its flow?

A. Built a pumping plant.

Q. You call that what?

A. Booster pump.

Q. How many booster pumps have you.

A. Two pumps in that plant.

Q. You have a sump where the water gathers and you pump it from there, you give it a kick and boost it on. A. Yes sir [131]

Q. Have you several pumps? A. Two.

(Testimony of John Davidson.)

Q. Two that have been in operation last year?

A. Yes sir.

Q. When did you get the last pump?

A. Last year.

Q. Isn't it a fact that you got a bigger pump because the smaller pump would not carry the load?

A. We have a modern system, we have a smaller motor with a bigger capacity.

Q. You got a bigger pump last year?

A. Yes sir.

Q. That was while Mr. Copeland and Mr. Bauman were on the Board?

A. Yes sir.

Q. Up to that time you used smaller pumps?

A. Yes sir.

Q. Did the Commissioners get any paddle wheels to kick the water along in those ditches?

A. That was an experiment a good many years ago.

Q. That didn't work either?

A. No sir.

Q. You have had considerable difficulty in constructing these main ditches as well as maintaining them?

A. Yes sir.

Q. The Commissioners purchased a dredge to construct these [132] ditches?

A. Yes sir.

Q. Did you use that dredge?

A. Yes, a considerable time.

Q. Was it practical?

A. Where it was muddy.

Q. You got this dredge to go in and build the ditches?

(Testimony of John Davidson.)

A. We just cleaned the old ditches out.

Q. This dredge floated?

A. Yes sir, it floated.

Q. You have been a commissioner since 1925?

A. Yes sir.

Q. State what in your opinion is the most practical time to go on that ground to dig ditches?

A. Late fall when the crops have been taken off.

Q. Isn't it a fact that it is better to go in when the ground is frozen than any other time.

A. In the fall.

Q. Isn't it more economical and practical to do the work in the winter time?

A. We start as soon as the crops are off.

Q. Isn't it a fact that you can work better in the winter when things were frozen?

A. It got to be that way because we didn't get through with the work.

Q. Is it more practical to go in the Summer when it is [133] all wet or to go in in the winter?

Mr. Whitla: It is wet all Summer.

Judge Hunt: Will you please let the witness answer.

The Court: This is cross examination, let him finish with it.

A. We have not done work there in the Summer.

The Court: You understand the question.

A. Yes, there is one thing, in the summer time it is not dry.

(Testimony of John Davidson.)

Q. The Court: Is it more practical in your judgment in the summer or the winter?

A. It is more practical in the summer.

Q. Then you do better work in the summer than in the winter.

A. Yes I can.

Q. Have you difficulty keeping the dragline out of the mud?

A. Yes sir.

Q. Don't you have less difficulty in the winter than the summer?

A. That particular ground doesn't make much difference.

Q. It freezes in the winter?

A. Not much.

Q. Don't part of it freeze in the winter?

A. Part of it freezes, yes. [134]

Q. It does freeze in the winter.

A. Well, it is pretty soft.

Q. I will ask you if it is not a fact that time after time when you have been working, that equipment has been mired, tractors, dragline and other equipment?

A. Yes sir, we have.

Q. Can you go over that without so much difficulty in the winter time?

A. It wouldn't make much difference on that ground.

Q. In 1928 I will ask you if it is not a fact that you bought two electric pumps and built an electric line to this property?

A. Yes sir.

Q. You got some Larsen pumps?

(Testimony of John Davidson.)

A. Yes sir.

Q. I will ask you if you didn't at that time pay Mr. Woldson two thousand dollars for that work?

Mr. Whitla: Objected to as incompetent, irrelevant and immaterial, if he furnished some money to build the line to this booster pump it is not a matter involved here.

The Court: Overruled.

Q. Did Mr. Woldson put up about two thousand dollars then, and wasn't it customary for Mr. Woldson to put money in the bank for work done and for warrants issued by the District? [135]

A. Yes sir.

Q. It went on for several years.

Mr. Whitla: Objected to as immaterial. It is not a question here as to what the custom was.

Judge Hunt: If counsel will agree that was the custom I will not question further on this.

The Court: Overruled, go ahead with the examination.

A. Yes.

Q. Mr. Davidson, I will ask you to refer to the minutes of June 21, 1928 being one of the minutes I asked you to produce during the noon hour. It is Plaintiff's exhibit 10. I will ask you if it is not a fact in plaintiff's exhibit 10, which are the minutes of drainage district number 1, for the 21st of June 1928, if it does not show the following bills read and allowed: "Martin Woldson warrants number 242, 243, 244, and 245, for purchasing material and

(Testimony of John Davidson.)

labor in accordance with Court Order, \$4,000.00.”

A. That is correct.

Q. And in the same meeting a bill allowed for; “warrants to Martin Woldson for purchasing material and labor in accordance with Court Order, warrants number 247, 248, 249, 250, 251, 252, 253, 254, \$7,000.00”. A. That is correct.

Q. Further if you didn’t allow this: “Martin Woldson, warrant [136] to pay for material and labor warrants number 256, 257 and 258”, that was for the sum of \$3,000.00

A. That is correct.

Q. I will ask you if at the same meeting there was allowed to Martin Woldson warrants to pay for material and labor in accordance with Court order amounting to \$2,000.00?

A. That is correct.

Q. To what Court order does that refer?

A. I presume there is a Court order for 1925. We have been working under two Court Orders, no, this must have been the Court Order of 1927.

Q. What did the Court order you to do?

A. I haven’t got a copy with me.

Q. In a general way, wasn’t it to do certain work on the ditches?

Mr. Whitla: I have a certified copy of This Court order.

A. It was to clean out the ditches.

Q. In accordance with this Court Order this \$16,000.00 was paid out? A. Yes sir.

(Testimony of John Davidson.)

Q. Will you refer to your minutes of the 8th of February 1928, and I will ask you if at that meeting you didn't order and purchase a Larsen Pump for the low lift? A. We did. [137]

Q. I will ask you if it is not a fact that during the early years when you were Commissioner, the property owners in that part of the District voluntarily assessed themselves an additional charge for pumping and maintenance work?

Mr. Whitla: Objected to as incompetent, irrelevant and immaterial, and not within the pleadings here.

The Court: The question here is what this District and these defendants have been doing. If other people contributed money or work and the District accepted it and it went into this work, of course, that would be another matter.

Judge Hunt: The purpose is to show that the property owners put in additional money in that area in an effort to drain it.

The Court: Let me see, you are complaining here because the plaintiff's land was not drained.

Mr. Whitla: Yes sir.

The Court: Can't they show that the money was used for draining this land. Would not they have a right to show this land was drained. I think they can show how it was drained. Overruled.

Q. Isn't it a fact that the property owners had paid additional assessments for the purpose of endeavoring to [138] drain that land? A. Yes sir.

(Testimony of John Davidson.)

Q. I will ask you if one of these gentlemen was not Mr. Zimmerman? A. Yes sir.

Q. State whether or not he attempted to farm, and did own a portion of this land we are now talking about? A. Yes sir, he did.

Q. State whether or not the Commissioners for a short period of time had a double assessment in that District, one for the average land and one for the land that required pumping?

Mr. Whitla: Objected to it is in violation of the Statute which says that it must be levied under the law. When they levy any assessment they assess the land at so much an acre.

The Court: The question seems to be was this land drained? You say that the plaintiff was damaged because the land was not drained, and they are showing now how it was drained. You have no contention here as to the legality of the assessment. That is not a question here. The question before me is, was this land drained, if so, how. If it was properly drained whether this man could be damaged. Whether the District drained it or someone else drained it makes no difference at this time. The issue is whether this man was damaged. [139] They are contending that an effort was made and the land drained and this man was not damaged. Overruled.

Mr. Whitla: I make the further objection that how much the assessment was is immaterial as to the question of whether it was drained or not. Also

(Testimony of John Davidson.)

the further objection that the assessment roll is the best evidence.

The Court: Overruled.

Q. Isn't it a fact that for a year or two the property owners in this Mirror Lake section or area voluntarily assessed themselves an additional assessment in an effort to drain this area?

A. I cannot answer that question.

Q. Didn't they have a double assessment.

A. According to the assessment roll——

Mr. Whitla: —We object to that as your assessment roll would be the best evidence.

The Court: Sustained.

Q. Don't you know of your independent knowledge that the property owners asked the commissioners to levy an additional charge against their land for drainage district purposes?

Mr. Whitla: Objected to as the assessment roll is the best evidence of this matter.

The Court: He asked of his personal knowledge. He may answer. [140]

A. I do not know. No sir.

Q. In the meeting on the 27th of November 1928 being the minutes of one of the meetings I asked you to produce, I will ask you if Mr. A. B. Ashby was a commissioner at that time?

A. I did not get my index of what you wanted completed.

Q. Was Mr. Ashby a commissioner at that time?

A. Yes, he was.

(Testimony of John Davidson.)

Q. Now, I will ask you if at that meeting you didn't pay, or order a warrant drawn to Mr. Ashby for 49 days work A. Yes sir.

Mr. Whitla: It is a question of draining this land.

The Court: Yes, that's right, of draining the land and not whether it was legal, go ahead.

Q. Wasn't it a fact that Mr. Ashby was paid for 49 days of work? A. That is correct.

Q. I will ask you if it wasn't a fact that John Davidson was paid for 151 days.

A. That is correct.

Q. And Frank Zimmerman was paid for 79 days of work? A. Yes sir.

Q. And that work was done on the District for maintenance? A. For improvements. [141]

Q. Most of that was in the Mirror Lake Section was it not?

A. Well, I cannot agree to that because when we were doing all this work we were doing other work at the headgate, we were buying equipment and laying pipe.

Q. In endeavoring to build the ditches through the Mirror Lake area, I will ask you if you ever resorted to the use of blasting powder?

A. Yes sir, we did.

Q. You even used Blasting powder?

A. Yes sir.

Q. You set off these sticks of dynamite in an effort to dig the ditches by the use of the explosive.

(Testimony of John Davidson.)

A. Yes sir.

Q. As a matter of fact you tried everything that human ingenuity could devise to dig these ditches?

Mr. Whitla: Objected to as immaterial.

The Court: If he knows, he may answer.

A. Yes sir.

Mr. Whitla: That would be a conclusion.

The Court: He says yes, he knows.

Q. I will ask you if in 1932 you had an agreement with Mr. Woldson to do certain work in this Mirror Lake area? A. In 1932.

Q. Yes, didn't you agree to spend one thousand dollars in Mirror Lake area over and above the assessment? [142] A. It seems to me we did.

Q. Isn't it a fact that you spent, not only the \$1000.00 but \$1500.00

A. We spent more than we agreed.

Q. Just for the purpose of trying to drain that Mirror Lake Area. A. Yes.

Judge Hunt: That is all

Redirect Examination

By Mr. Whitla:

Mr. Whitla: I will ask to have this marked as exhibit "12".

Judge Hunt: We have no objection to this going in.

The Court: Admitted.

(Testimony of John Davidson.)

PLAINTIFF'S EXHIBIT No. 12

Admitted Nov. 21, 1941

In the District Court of the Eighth Judicial District
of the State of Idaho, in and for the
County of Boundary

In the Matter of DRAINAGE DISTRICT NO. 1
OF BOUNDARY COUNTY, IDAHO

ORDER

In the above entitled matter, the Commissioners of Drainage District #1 having made application to the Court for an Order for permission to do additional work and incur additional expense in connection with the drainage of the land within said Drainage District, which has not been drained by the work heretofore done, said application being based upon Findings of Fact and Conclusions of Law and Order and Decree made and entered by the Court in the above entitled matter on the 16th day of March, 1925, by which it was determined by the Court that certain additional work should be done by the Commissioners of said District for the purpose of furnishing additional drainage to the land of certain objectors who appeared in opposition to the confirmation of certain assessments proposed to be made against the land of said objectors within the limits of said district and it appearing from the report of the present Commissioners of said Drainage District that there has been a change

(Testimony of John Davidson.)

in the Commissioners of said District since said order was made and it further appearing that the above mentioned order of the Court has not been complied with by the Commissioners in the office at the time said order was made or by the Commissioners that have since been in office.

And Whereas, by said above mentioned Order it was adjudged that an emergency existed requiring the construction of certain work, the cost of which would be borne as maintenance charge against said District and the Commissioners on this application having presented with their application, plans of their Engineer for the construction of the work heretofore ordered to be done by the Court pursuant to the above mentioned Order made March 16, 1925, the total estimated cost of said improvement being Twenty Three Thousand [399] (\$23,000.00) Dollars in accordance with a detailed estimate hereto attached, reference to which is hereby made and the same made a part hereof.

Wherefore, It Is Ordered, that a new outlet be constructed by the Commissioners of said Drainage District #1 with a grade approximately two (2') feet lower than the present outlet of said District, said original outlet not to be changed or interfered with at all, the new outlet to be located as follows:

Beginning at the junction of the Main and Frye Lake ditches of Drainage District #1, which point is about 300' North of the Southwest (SW) corner of Lot Six (6) Sec. 19, Twp.

(Testimony of John Davidson.)

62 N.Rg. 1 E.B.M. running thence Northerly across said Lot Six (6) to the left bank of the Kootenai River a distance of about Five Hundred (500') Feet.

The Commissioners are Further Ordered, to cause the necessary pipe to be put in place for the purpose of carrying the water out of said Drainage District thru said proposed outlet and also to cause all pipes to be installed that may be necessary or advisable to successfully drain said land and conduct the water thru said outlet.

The Commissioners are Further Ordered, to deepen and clean out the ditches now constructed in said Drainage District to such depth as may be necessary and to construct such other ditches within said Drainage District as may be necessary to sufficiently drain all the land within said Drainage District to such extent as may be necessary to make all of the land within said Drainage District suitable for agricultural purposes.

The Commissioners are Further Ordered to install a pump at the following location, to-wit:

Approximately at the section corner common to Sections 31 and 32, Twp. 62 N R. 1 E.B.M. on the township line between Twp. 61 and 62 N.R. 1 E.B.M.

and cause such pump to be operated at all times that may be necessary to provide suitable drainage for the land not drained by the drainage system as

(Testimony of John Davidson.)

now constructed, provided, however, that in the discretion [400] of the Commissioners the pump now in use may be moved to the above mentioned location instead of installing an additional pump if the Commissioners shall determine that the result can be accomplished by moving the location of the pump now installed.

Done in Open Court this 20th day of February, 1928.

W. J. McNAUGHTON

District Judge.

ESTIMATED COST OF EMERGENCY WORK

Drainage District No. 1—Boundary County, Idaho.

Plan No. D

	Estimate
1,200' Back Fill present Ditch "Y" to Outlet.....	\$ 1,500.00
Sump Construction	1,100.00
1,200 feet 48" Wood Pipe.....	5,300.00
Preparing Ditch for Pipe.....	1,200.00
Changing Pumps etc:.....	200.00
Lowering Outlet Structure (S of Present).....	1,500.00
550' 48" pipe S of "Y" in place.....	2,210.00
Back Fill South of "Y".....	1,000.00
Back Fill East of "Y".....	1,000.00
1,000 24" pipe.....	2,047.00
Teaming	100.00
	<hr/>
	\$17,157.00
10% contingencies	1,715.70
	<hr/>
	18,872.70
Estimate of cost of cleaning out and widening Mirror Lake Ditches.....	4,127.30
	<hr/>
	\$23,000.00

(Testimony of John Davidson.)

State of Idaho,
County of Boundary—ss.

Filed Feb. 23, 1928, Dollie Bruce, Clerk of District Court. By H. M. Macnamara, Deputy. [402]

State of Idaho,
County of Boundary—ss.

I, Dollie Bruce, Clerk of the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Boundary, and Ex-officio Auditor and Recorder, do hereby certify that the above and foregoing Order filed 2/23/1928 in case No. 245 in the matter of Drainage District No. 1 is a full, true and correct transcript of the same as it now appears in my office.

Attest my hand and seal of said Court this 14th day of November, A. D. 1941.

[Seal]

DOLLIE BRUCE

Clerk of the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Boundary. [403]

Q. Now, Mr. Davidson, come down here to the map again and show us where these things occur. The Order refers to this work to be done, beginning at the junction of the Main and Fry Lake ditches.

A. Here is the ditch to Fry Lake, (indicating)

Q. Where is the main ditch?

(Testimony of John Davidson.)

A. Coming in here (indicating).

Q. They connect between the Northwest quarter of the Northwest quarter of Section 29 and the Northeast of the Northeast of section 30?

A. Yes sir. [143]

Q. How far is that from Mirror lake District?

A. This section.

Q. Yes? A. One mile.

Q. About two miles from Mirror Lake District isn't it. A. That's correct.

Q. What were you doing there about lowering the outlet and putting in that pipe? A. In 1925.

Q. No, in 1928.

A. Cleaning all these ditches, all through there.

Q. What were you doing about installing the pipe?

A. At this particular place we had—you see the river was very high and at this place it developed boils——

Q. —But Mr. Davidson, what did you do about buying a large amount of pipe and putting a large amount of pipe in there and lowering the outlet.

A. We purchased several hundred feet of corrugated galvanized pipe, about eight hundred feet.

Q. This Court Order provides for twelve hundred feet of forty-eight inch wood pipe, \$5300.00. Did you get that? A. We got that also.

Q. Where did that go? A. Lateral two

Q. That shows on the map as main drainage canal?

(Testimony of John Davidson.)

A. This is to the Fry Lake district here, yes.

[144]

Q. Also provides for preparing the ditch for the pipe? A. We did that.

Q. Lowering the outlet structure?

A. We did that.

Q. Provides for five hundred fifty feet of forty-eight inch pipe south of Y in place?

The Court: I think perhaps you should show that order to the witness.

Judge Hunt: I don't object to his reading from it.

A. We put that in the outlet structure.

Q. That is across in section 19.

A. Right in deep creek.

Q. How far from the entrance into the Kootenai River. A. Approximately two hundred feet.

Q. It provides for a sump construction, where was that located?

A. About two hundred feet inside of the outlet pipe.

Q. That is in Section 19? A. Yes sir.

Q. Provides for changing the pumps, did you change the pumps? A. Yes sir.

Q. This 48 inch pipe S of Y that is south of Y?

A. Yes sir, that went in too.

Q. And it provides for backfill south of Y \$1000.00? A. Yes sir. [145]

Q. Was that done? A. Yes sir.

(Testimony of John Davidson.)

Q. It also provides for \$1000.00 backfill east of Y. A. Yes sir.

Q. And 1000 ft. 24 inch pipe.

A. Yes, we got that.

Q. Where was it used?

A. In the ditch going to Fry Lake. We had some trouble there, it developed boils.

Q. That is the same as the Mirror Lake section and caused the ditch to cave in?

A. In the Mirror Lake Section we didn't know where the water would come from, but it is pretty much on the same order.

Q. What else did you do besides that in 1928?

A. Cleaned the main ditch clear through.

Q. Where did you begin and where did you end?

A. We began at about this point (indicating) and went through the whole ditch.

Q. Here at the junction with the main ditch and followed it south and east to the Simon McDonald land and through the Bauman land?

A. Yes sir.

Q. It provides for the installing of a pump at the corner of sections 31 and 32, did you do that at that time? [146] A. Yes sir.

Q. At the same time? A. Yes sir.

Q. That was in 1928.

A. I cannot remember but the record would show.

Q. Prior to that time what had been the condition of the draining of this land in the Mirror Lake

(Testimony of John Davidson.)

Section, was it drained or was most of it not subject to cultivation?

A. No, it could not have been cultivated.

Q. After you did this work was considerable of this land subject to cultivation?

A. It was, yes.

Q. This Order further says "the commissioners are further ordered to deepen and clean out the ditches now constructed in said drainage district to such depth as may be necessary and to construct such other ditches within said drainage district as may be necessary to sufficiently drain all the land within said drainage district to such extent as may be necessary to make all of the land within said drainage district suitable for agricultural purposes." You knew that was in there did you?

A. Yes sir.

Q. What is the fact as to whether it was done?

A. We have been doing that work from time to time. [147]

Q. Is there a part of this land, particularly this part belonging to Mr. Woldson south and east of Simon McDonald's that is sufficiently drained to be cultivated?

A. Part of it is not suitable for cultivation.

Q. You understood that when this notice or demand by Mr. Woldson to clean out these ditches and put them in shape, that this was what it referred to, this land that was not drained.

A. Yes sir.

(Testimony of John Davidson.)

The Court: What is the date of this order that you have there?

Mr. Whitla: February 20, 1928

Q. Did Mr. Bauman do anything,—strike that,—what did Mr. Bauman do at the time of this meeting relative to Mr. Woldson's demand that you clean out these ditches and clean out the slides so that the ditches would drain?

Judge Hunt: We object to this until the date is fixed.

Q. I think it is May 8th. No. Under date of May 18, 1940 plaintiff's exhibit 3, did Mr. Bauman say what Mr. Woldson would have to do relative to paying for getting these ditches cleaned out and if he wanted this land drained? Not what the minutes show,—did Mr. Bauman make any statement as to whether or not they would clean out the ditches for Mr. Woldson unless he paid for it. Just [148] using the minute to fix the date. Was there anything said by Mr. Bauman as to whether or not Mr. Woldson would have to make payment for that work himself?

A. Mr. Bauman said that we had spent more money than that land was worth.

Q. What did he say that Mr. Woldson would have to do if he got that land reclaimed or the ditches cleaned or the land drained.

A. I have no record of what was said in the minutes.

(Testimony of John Davidson.)

Q. Did Mr. Baumann make any statement to you at that time as to whether Mr. Woldson would have to pay for getting that land drained?

A. He made the statement that it makes it expensive.

Q. What expensive.

A. Too much expense on the ditches.

Q. Did he say who would have to do it, if he got the work done?

Judge Hunt: Objected to as leading.

The Court: Sustained.

Q. You said something about asking Mr. Woldson to pay half to get this land drained, did you require anybody else to pay half to get their land drained? A. No sir.

Q. You spoke about hiring this dragline that Mr. Farnum used in 1939, you refused to make payment for that. Who hired that dragline? [149]

A. I think I hired it myself.

Q. Who did you hire that from?

A. McGlocklin & McDonald

Q. Did Mr. Woldson have anything to do with hiring it? A. No sir.

Q. You hired Mr. Farnum to run it?

A. Yes sir.

Q. Mr. Woldson had nothing to do with hiring Mr. Farnum to operate it? A. No sir.

Q. You said something about doing more work that you agreed to in the Mirror Lake area in 1932, where have you any minutes of that in your record?

(Testimony of John Davidson.)

A. In 1932.

Q. Yes, have you anything in 1932 authorizing you to do work in Mirror Lake?

A. Apparently I have not.

Q. As a matter of fact when did Mr. Zimmerman ever pay to the District any money whatever to apply on any assessment other than that which was assessed by the district itself at regular assessment periods for the purpose of reclaiming any land in drainage district number 1?

Judge Hunt: If you know.

A. That would be a matter of record. I don't know myself.

Q. Did he ever make payment of extra money to pay for the [150] drainage of any land?

A. I cannot say.

Q. As a matter of fact this land that belongs to Mr. Woldson didn't belong to Mr. Woldson that year, in 1932?

A. No sir.

Q. You and Mr. Ashby had a meeting to cancel Mr. Zimmerman's assessment?

A. It seems to me that we did.

Q. Now, I hand you exhibit 12. That was taken from your books. Is that a record of the meeting held that day?

A. Yes sir.

Q. You did pass a resolution to cancel that assessment on the land, being a good part of the land in controversy?

A. Yes sir.

Q. On account of being unable to drain the same and unable to crop the same?

(Testimony of John Davidson.)

Judge Hunt: To which we object, it is self serving and it is evident that it is a carbon copy of something not signed.

The Court: You object that it is not properly identified.

Judge Hunt: It shows that it is a carbon copy. The instrument speaks for itself.

The Court: Objection is sustained.

Q. Is that instrument the record you have of that meeting [151] that was taken from the book?

A. It is the record and that is my signature.

Q. Made through the carbon, that is a carbon copy. A. Yes sir.

Q. That is the one you have in the minute book?

A. Yes sir, that is correct.

Q. It is a part of the record? A. Yes sir.

Q. Is that the record you have of that meeting?

A. Yes sir.

The Court: Did you offer it.

Mr. Whitla: I will have it marked and offer it.

The Court: Admitted.

PLAINTIFF'S EXHIBIT No. 13

Admitted Nov. 21, 1941

Bonnors Ferry Ida July 1st 32

Motion by Zimmerman seconded by Davidson.

That Drainage Dist no 1 cancel the assesments for pumping amounting to \$797.16 and maintenance

(Testimony of John Davidson.)

amounting to \$1930.60 *accuring* against lands formerly owned by Frank Zimmerman and Oscar Davis. as follows,

All that part of lot two and three lying and being within Drainage Dist no 1 sect eight. sixty one N.R. one east B M 12.05 avres former owner Oscar Davis.

All of that part of lot one section eight. twen. 61 E. lying and being within Drainage Dist no one. S. 21 acres former owner Davis

All of that parts of lote two and three N.W. of GN. in sect nine twen. sixty one N.R. 1. east B.M. laying and being within Drainage Dist no one. 27.21 former owner Frank Zimmerman.

All lot no four less part east G N RY sect four township sixty one R. one E. within drainage dist no one. 26.95 acre former owner Frank Zimmerman.

All lot no six sect four, twen. sixty one r. one e. within *drainage* dist no one 10.36 acres former owner Frank Zimmerman.

All lot no six B sect four and nine. twen. sixty one R one E. within drainage dist no one. 57.32 Acres former owner Frank Zimmerman.

All lot no seven set. five and eught. twen, sixty one r. one E. within drainage dist no one 48.84 acres former owner Oscar Davis.

All lot eight sect five and eight twen. sixty one R one E. within drainage dist no one. 66.39 acres former owner Georgia Morrison.

(Testimony of John Davidson.)

All lot eight B sect eight tw'n. sixty one R. one E. within drainage Dist no one. 1.65 acres former owner Georgia Morrison

All lot no eight C. sect five tw'n sixty one R one E. within drainage dist no one. 23.39 acres former owner Georgia Morrison.

All lot no eight D. sect five tw'n. sixty one R. one E. within drainage Dist no one. 55.02 acres former owner Georgia Morrison.

All of that part lots three and four lying and being within drainage no one of sect five tw'n. sixty one. N. R. one east B.M. 14.28 acre former owner Oscar Davis.

account said land has never been benifited by drainage and unable to crop same

A. B. ASHBY

Chairman

JOHN DAVIDSON

Sec [404]

Q. Now, Mr. Davidson, counsel asked about your record of November 27, 1928 showing 49 days work by Mr. Ashby and 151 days by yourself, and 79 days by Frank Zimmerman, now then, come to the map to show us where you did that work, you and the other Commissioners? A. That was in 1928.

Q. That was the year you were authorized to put in these works?

(Testimony of John Davidson.)

A. At that time we were laying these pipes and doing that work continuously down through the district.

Q. That was work you testified about having been done at the outlet. [152] A. Yes sir.

Q. The cleaning out of the ditch clear around there. A. Yes sir.

Q. Who ran the dragline on cleaning out that ditch, did Mr. Ashby or you or Mr. Zimmerman?

A. No sir.

Q. Did any of you work on that dragline?

A. We were supervisors of the work.

Q. Something was said about having used some powder to shoot out some of the ditches, when was that used to shoot out the ditches?

A. I cannot state the date or the time, but a considerable part of it was in Mirror Lake and in the ditch by Bauman's and in different places. At that time there was no dragline available or something, I don't remember the reason, but we did use the powder.

Q. That is a regular thing to open ditches up by putting in a hole and using powder?

Judge Hunt: Objected to as leading.

The Court: Sustained, it is leading.

Q. What is the fact as to whether or not it is the practice to open ditches in that way?

A. Yes sir.

Q. Mr. Bauman's land which you used that on, that land is on this same main ditch only north

(Testimony of John Davidson.)

about a half mile [153] from Mr. Woldson's land, in controversy here. A. Yes sir.

Q. Something was said about tractors and draglines being mired on this ground?

A. On Mirror Lake, yes.

Q. When was this. A. Several times.

Q. Did Mr. Oscar Davis have tractors mire there in plowing in 1940?

A. I think he has, but I cannot say.

Q. Is that something that happened frequently to land in this territory? A. Yes sir.

Q. To several people in this District, did it happen? A. Mostly in this Mirror Lake area.

Q. Where did the dragline mire down, something was said about that?

A. I wouldn't say that a dragline was mired, but we have been going on mats.

Q. Going on mats. A. Yes sir.

Q. You mean that you lay logs for the dragline to go on? A. Yes sir.

Q. If you have a soft bank there and you try to clean it out what happens? [154]

A. The bank gives away.

Q. When you get the heat of the summer sun what happens? A. It gets better.

Q. You did this work late in the fall and winter because you were through cropping?

A. Yes sir.

Q. The Commissioners had time to give it attention.

(Testimony of John Davidson.)

Judge Hunt: Objected to as leading and suggestive.

The Court: Sustained.

Q. What was the reason you did it in the fall after you got through cropping?

Judge Hunt: Objected to as it has been answered.

The Court: He has answered it. It would be repetition.

Q. In 1935 you did no work in Mirror Lake excepting S. B. Blankenship, you paid him \$32.00

Judge Hunt: We object to this, as the record would be the best evidence.

The Court: Do you remember that is a fact.

A. I know it was a fact that we wasn't doing any work, we didn't have any money.

Q. In 1936 you didn't do any work at all in Mirror Lake.

Judge Hunt: We object to the form of the [155] question. It suggests an answer.

The Court: Sustained.

Q. In 1937 what, if anything, did you do in relation to work on the Mirror Lake area?

A. The Warrants would show where we paid out money for work.

Q. Did you state that in 1940 you did no work excepting in one place?

A. It seems to me that last year we were doing work there.

Q. What work did you do in 1940?

(Testimony of John Davidson.)

A. In 1940, I cannot positively say but if I see the warrant stubs I can tell, I would rather see the warrant stubs.

Q. Now look at the map again. You say that this lateral goes north through Bauman's land up to the S & I tracks, now, tell me where is Mud Lake. A. Mud Lake is here (indicating)

Q. About the north boundary of section 33.

A. In here (indicating)

Q. Along by Bauman's land.

A. North of Bauman's land.

Q. All the water comes out of Bauman's land and down through this lateral toward the Great Northern tracks and back to Mirror Lake, now, if an obstruction occurs in Mirror Lake area what becomes of that water. A. It backs up.

Q. And spreads over whose land? [156]

A. The land in Mirror Lake.

Q. What is the fact as to whether slides occur at the Southeast corner, or where this lateral turns North, year after year? A. Yes, that is a fact.

Q. Were there slides there in 1940?

A. Yes sir.

Q. What about in 1939?

A. Slides in there every year.

Q. How much did these slides back the water up in that main ditch to the North?

A. Approximately two feet.

Mr. Whitla: That is all

(Testimony of John Davidson.)

Recross Examination

By Judge Hunt:

Q. When these slides occur they are cleaned out by the Commissioners or under their direction?

A. We have time and time again.

Q. Mr. Woldson don't own all of the land in the Mirror Lake Section?

A. I think at the present time he does.

Q. Did Mr. P. T. Casey have certain land down there that isn't drained? A. Yes sir.

Q. Did Mr. Bauman own some land there that isn't drained? A. Yes sir. [157]

Q. Did Mr. Ashby own some land in there that was not drained?

A. He has also land that is not drained.

Q. Casey, Bauman and Ashby have all been commissioners or are commissioners of the District?

A. Yes sir, they have been or are.

Q. Is there anything regarding,—Please strike that,—Is there anyone else who owns land there that is not drained except those we have named?

A. No sir.

Q. Counsel introduced plaintiff's exhibit 13 which was a resolution of July 1932 wherein the Board attempted to cancel certain drainage district assessments. I will ask you if that action was not later revoked by the same Board? A. It was.

Q. How long have you been in that district?

A. I have been there since it was built.

(Testimony of John Davidson.)

Q. Since it was built. A. Yes sir.

Q. You are buying land there now.

A. Yes sir.

Q. And you are buying this land from whom?

A. Mr. Woldson.

Q. You are still under contract for the land you occupy now, from Mr. Woldson? [158]

A. Yes sir, I am

Q. Will you refer to the minutes of your meeting under date of the 29th of October 1932 from which you testified a minute ago. Now I hand you instrument which has been marked as defendant's exhibit 14, which purports to be a copy of drainage district number 1, meeting as of the 29th of October 1932. Read it and tell me whether such meeting was had?

DEFENDANT'S EXHIBIT No. 14

Admitted Nov. 22, 1941

Minutes of Meeting of Drainage District No. 1

Bonnors Ferry, Idaho

Commissioner of Drainage District No. 1 held a meeting on this 29th day of October, 1932.

Commissioners present were A. B. Ashby, John Davidson, and Frank Zimmerman; Mr. Martin Woldson and E. W. Wheelan, the District Attorney, were also present.

(Testimony of John Davidson.)

Meeting was called by the chair for purpose of deciding on the pay of expense of the cleaning of ditches in Mirror Lake.

The question about the Drainage expenses in Mirror Lake of \$500.00 above \$1000.00 that the Commissioners agreed to pay Mr. Woldson demanded that the Drainage District #1 pay in full and also agreed to accept District Warrant in return pay cash for labor and other expenses. Motion made by Davidson that Drainage District No. 1 stand all expenses in cleaning ditches in Mirror Lake. Seconded by Ashby. Carried.

At this meeting was also taken up some settlement in regard to the land Mr. Woldson bought at tax sale in Mirror Lake—an amount of \$2464.99 that was overpaid by Mr. Woldson. Said amount was ordered paid.

Meeting adjourned at call of the chair.

(Sgd.) JOHN DAVIDSON

Sec. [405]

A. That is a fact, yes sir.

Q. Your original record is lost? A. Yes sir.

Q. Would you say that was a correct copy of the minutes from that date?

A. That is a correct copy.

Q. I will ask you if it is not a fact that at your meeting held on the 29th of October 1932, the question did not come up that the expenses for draining

(Testimony of John Davidson.)

Mirror Lake were five hundred dollars more than the One thousand dollars that the Commissioners had agreed upon as a payment to Woldson,—

Mr. Whitla: Objected to as he has not shown that he has made a search for the original minutes. This just a bunch of loose leaf papers here.

The Court: The law requires that a record be kept in drainage districts, and now you are asking [159] this man if this is a copy of these minutes or of this record.

Judge Hunt: The witness said that he had no record.

The Court: But there is no showing as to the original.

Judge Hunt: We have nothing further of this witness.

Redirect Examination

By Mr. Whitla:

Q. Mr. Davidson, will you point out to the Court where this land of Mr. Bauman's within the Mirror Lake District is located?

A. Here (indicating)

Q. As to the land that was not drained, where does that lie?

A. That is in here, (indicating) near the railroad.

Q. In the Northeast quarter of section 33?

A. Yes, in here (indicating)

Q. Where does Mr. Ashby's land lie?

(Testimony of John Davidson.)

A. That is adjacent, in the northwest quarter of the Northeast quarter of section 34.

Q. In the Northeast of the Northeast of 34.

A. In here (indicating)

Q. Where does Mr. Casey's land lie?

A. Casey's. [160]

Q. Yes. A. Up in there (indicating)

Q. That would be in the Northeast of the Northeast of section 33, or over in Section 28.

A. Up in here (indicating)

Q. Section 28. A. Yes sir.

Q. That would be something like a mile and a half from the land in controversy. A. Yes sir.

Q. Their land is not even a part of Mirror Lake?

A. No sir.

Q. Do you know when that order of July 1932 was revoked? A. No sir, I don't.

Mr. Whitla: That's all

Judge Hunt: That's all

The Court: We will recess for ten minutes.

4:10 P. M. Nov. 21, 1941.

Mr. Whitla: We offer in evidence exhibits 15 and 16, being a stipulation and answer, and findings of fact and conclusions of law of the Court relative to the necessity of this work and directing that it be done.

Mr. Wilson: No objection.

The Court: Admitted. [161]

PLAINTIFF'S EXHIBIT No. 15

Admitted Nov. 21, 1941

In the District Court of the Eighth Judicial District
of the State of Idaho, in and for the
County of Boundary.

In the Matter of DRAINAGE DISTRICT NO. 1
OF BOUNDARY COUNTY, IDAHO.

STIPULATION

It is hereby stipulated and agreed by and between E. W. Wheelan, Attorney for W. R. Hoagland, J. H. McDonald and Frank Clapp, Commissioners of Drainage District No. 1 of Boundary County, Idaho, and O. C. Wilson, Attorney for Georgia A. Morrison, Frank Zimmerman, H. W. Mansfield, Martin Peterson, James Deyoe and Simon McDonald, objectors, that the Court may make Findings of Fact and Conclusions of Law and enter a decree based upon the following agreed statement of facts, relative to Petition and Order to Show Cause made and entered herein on the 13th day of December, 1924 in connection with Supplemental and Additional Assessment Roll on the Mirror or Sproll's Lake Area and on the Fry Lake Area of said District, it being hereby agreed between the parties hereto as follows, to-wit:

I.

That the lands of the objectors above named, have not been drained by the facilities provided by Drain-

age District No. 1 of Boundary County, Idaho, and said lands are entitled to be suitably drained for agricultural purposes by virtue of the charges and assessments imposed upon said lands for said purpose;

II.

That the lands of the above named objectors would be drained if the main drainage ditch of said District had not been obstructed by the caving of banks so that the same is not as deep as originally constructed and as called for by the plans and specifications of said ditch, and if several laterals were constructed as recommended by engineers and the outlet of said ditch lowered if finally recommended by the engineers. [406]

III.

That if the original grade of the said ditch be restored from its outlet throughout its entire length, and several laterals were dug as recommended by the engineers, and the outlet of said ditch were lowered or other slight adjustment of said outlet made as finally determined by the engineers, the lands of the objectors would be drained sufficiently for agricultural purposes.

IV.

That the Commissioners of Drainage District No. 1 of Boundary County, Idaho are entitled to an order dismissing the petition of the objectors in

so far as said petition prays for an order vacating of modifying the Findings of Fact, Conclusions of Law or Decree entered herein relative to the confirmation of the Supplemental and Additional Assessment Roll concerning the Mirror or Sproll's Lake Area and The Fry's Lake Area.

V.

That the objectors above named, are entitled to an order directing the Commissioners of said Drainage District No. 1 to forthwith, at the expense of said District and as an item of maintenance chargeable to the entire district, proceed to clean out said ditch to the original level thereof and maintain said ditch to said original level, construct such laterals as may be required, and lower the outlet of the ditch or make such adjustment thereof as may be required, and to do all of said work under such engineering supervision and direction as is acceptable to the Commissioner's of said District and the objectors herein.

VI.

That the entire expense of the work, as above outlined, is a necessary expense of maintenance to be borne by the entire Drainage District as a whole; and the Commissioners of said district and objectors are entitled to an order declaring that an emergency exists for the creation of the indebtedness to be incurred in connection herewith in case the cost of such [407] maintenance and repair ex-

ceeds the revenue heretofore provided for the maintenance fund for the year 1925.

E. W. WHEELAN

Attorney for Commissioners of
Drainage District No. 1 of
Boundary County, Idaho.

P. O. Address, Sandpoint,
Idaho.

O. C. WILSON

Attorney for Objectors

P. O. Address, Bonners Ferry,
Ida.

Dated March, 1925

State of Idaho,
County of Boundary—ss.

Filed Mar. 16, 1925, at 1:10 o'clock P. M. Dollie Bruce, Clerk of District Court. By H. M. Macnamara, Deputy. [408]

[Title of State Court and Cause.]

ANSWER.

Come now W. R. Hoagland, J. H. McDonald and Frank Clapp, Commissioners of Drainage District No. 1 of Boundary County, Idaho, and answer the Petition and Order to Show Cause made and entered herein on the 13th day of December, 1924, which Order has been continued at various times by consent of counsel:

I.

Admit that at the time Decree was entered herein confirming the assessment roll a Stipulation was entered into between the owners of a portion of the land embraced within said District, as set forth in paragraph Four (4) of the Petition herein, and admits that the Decree confirming said assessment roll contained the provision set forth in paragraph Six (6) of said Petition.

Further answering said Petition the Commissioners allege that immediately after the filing of Decree confirming the assessment roll herein, a large amount of work was done at the expense of the District in deepening the drainage ditch where the same runs through and adjacent to the land of the objectors, such work being done pursuant to an oral agreement or understanding entered into at the time the above mentioned Stipulation was made, and that at the time of entering into said Stipulation and at the time of performing the work above mentioned, your Commissioners believed, and the objectors also believed, that the contemplated work would result in the successful drainage of all of the land of all of the objectors, but after the contemplated work was completed it was discovered that the main drainage ditch did not carry off the drainage water rapidly enough to completely drain the land of the objectors, by reason of obstructions having been formed in the drainage ditch between

the land of the objectors and the outlet of said ditch. [409]

The Commissioners further allege that within the past thirty (30) days a survey of the land within said Drainage District has been made by a disinterested engineer employed by some of the objectors, and the said engineer has made a survey of the land within said District and has made a report to the Commissioners setting forth that the only work required to be done in order to completely drain the land of the objectors is that the entire ditch, from its outlet throughout its entire length, be cleaned out and the obstructions removed, so that the original grade of said ditch at the time the same was finally completely be restored, and your Commissioners allege that upon this work being done by the District all of the land of the objectors will be suitably drained.

Your Commissioners further allege that such work of cleaning out said ditch throughout its entire length is work properly chargeable to said District as maintenance, and not a proper charge against any portion of the land within said District as an additional assessment.

Wherefore Your Commissioners pray that an order be made and entered herein dismissing the Petition of the objectors insofar as said Petition prays for an order vacating or modifying the Findings of Fact, Conclusions of Law or Decree entered

herein, but ordering, adjudging and determining that the work above mentioned be done by your Commissioners at the expense of the District as an item of maintenance; and further determining that the expense and cost of such work is a necessary expense of maintenance to be borne by the District as a whole; and ordering, adjudging and declaring that an emergency exists for the creation of indebtedness to be incurred in connection therewith, in case the cost of such improvement shall exceed the revenue heretofore provided for the maintenance fund for the year of 1925.

Your Commissioners pray for such other and further relief as to the Court may seem meet and equitable.

E. W. WHEELAN

Attorney for Commissioners,
P. O. Address: Sandpoint,
Idaho. [410]

State of Idaho,
County of Boundary—ss.

W. R. Hoagland being first duly sworn on oath deposes and says that he is Chairman of the Board of Commissioners of Drainage District No. 1 of Boundary County, Idaho; that he has read the above and foregoing Answer and knows the contents thereof and believes the facts therein stated to be true.

W. R. HOAGLAND

Subscribed and sworn to before me this 7th day of March, 1925.

[Notarial Seal]

O. C. WILSON.

Notary Public for Idaho, Residing at Bonners Ferry, Idaho.

State of Idaho,
County of Boundary—ss.

Filed March 7, 1925 at o'clock, M. Dollie Bruce, Clerk of District Court. [411]

State of Idaho,
County of Boundary—ss.

I, Dollie Bruce, Clerk of the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Boundary, and Ex-Officio Auditor and Recorder, do hereby certify that the above and foregoing Stipulation filed 3/16/1925 and answer filed 3/7/1925 in case No. 245 in the matter of D. Dist #1. is a full, true and correct transcript of the same as it now appears in my office.

Attest my hand and seal of said Court this 14th day of November, A. D., 1941.

[Seal]

DOLLIE BRUCE

Clerk of the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Boundary. [412]

PLAINTIFF'S EXHIBIT No. 16

Admitted Nov. 21, 1941.

[Title of State Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled matter coming on to be heard this 16th day of March, 1925 in open Court at Bonners Ferry, Idaho, upon the Petition for and Order to Show Cause made and entered herein on the 13th day of December, 1924, in connection with the confirmation of the Supplemental and Additional Assessment Roll filed in said matter relative to the Mirror or Sproll's Lake Area and the Fry's Lake Area in said District, and the matter being presented upon an agreed statement of facts on file in this Court, and the Court being satisfied in the premises and under said stipulated and agreed statement of facts does hereby make the following

Findings of Fact

I.

That the lands of the objectors, viz., Georgia A. Morrison, Frank Zimmerman, H. W. Mansfield, Martin Peterson, James DeYoe and Simon McDonald, have not been drained by the facilities provided by Drainage District No. 1 of Boundary County, Idaho, and said lands are entitled to be suitably drained for agricultural purposes by virtue

of the charges and assessments imposed upon said lands for said purpose;

II.

That the lands of the above named objectors would be drained if the main drainage ditch of said District had not been obstructed by the caving of banks so that the same is not as deep as originally constructed and as called for by the plans and specifications of said ditch, and if several laterals were [413] constructed as recommended by engineers and the outlet of said ditch lowered if finally recommended by the engineers.

III.

That if the original grade of the said ditch be restored from its outlet throughout its entire length, and several laterals were dug as recommended by the engineers, and the outlet of said ditch were lowered or other slight adjustment of said outlet made as finally determined by the engineers, the lands of the objectors would be drained sufficiently for agricultural purposes.

From the above Findings of Fact the Court makes the following:

Conclusions of Law

I.

That the commissioners of Drainage District No. 1 of Boundary County, Idaho, are entitled to an order dismissing the petition of the objectors in so

far as said petition prays for an order vacating of modifying the Findings of Fact, Conclusions of Law or Decree entered herein relative to the confirmation of the Supplemental and Additional Assessment Roll concerning the Mirror or Sproll's Lake Area and The Fry's Lake Area.

II.

That the objectors above named, are entitled to an Order directing the Commissioners of Drainage District No. 1 to forthwith, at the expense of said District and as an item of maintenance chargeable to the entire district, proceed to clean out said ditch to the original level thereof and maintain said ditch to said original level, construct such laterals as may be required, and lower the outlet of the ditch or make such adjustment thereof as may be required, and to do all of said work under such engineering supervision and direction as is acceptable to the Commissioners of said District and the objectors herein.

III.

That the entire expense of the work, as above outlined, [414] is a necessary expense of maintenance to be borne by the entire Drainage District as a whole; and the Commissioners of said district and objectors are entitled to an order declaring that an emergency exists for the creation of the indebtedness to be incurred in connection herewith in case the cost of such maintenance and repair exceeds the

revenue heretofore provided, for the maintenance fund for the year 1925.

W. F. McNAUGHTON,
District Judge. [415]

[Title of State Court and Cause.]

ORDER AND DECREE

The above entitled matter coming on to be heard this 16th day of March, 1925, upon the Petition and Order to Show Cause made and entered herein on the 13th day of December, 1924, in connection with the Supplemental and Additional Assessment Roll on the Mirror or Sproll's Lake Areas and on the Fry Lake Area of Drainage District No. 1 of Boundary County, Idaho, and said matter having been submitted to the Court upon an agreed statement of facts, and the Court being satisfied in the premises, and having made Findings of Facts and entered Conclusions of Law herein,

It Is Hereby Ordered, Adjudged and Decreed,

I.

That the petition of the objectors, Georgia A. Morrison, Frank Zimmerman, H. W. Mansfield, Martin Peterson, James Deyoe, and Simon McDonald, for an Order to Show Cause, which was filed on December 13, 1924, be and the same is hereby dismissed in so far as said petition prays for an order vacating or modifying the Findings of Fact, Conclusions of Law or Decree entered herein

relative to the confirmation of the supplemental and additional assessment roll concerning the Mirror or Sproll's Lake Area and the Fry Lake Area;

II.

That W. H. Hoagland, J. H. McDonald and Frank Clapp, commissioners of Drainage District No. 1 of Boundary County, Idaho, be and they are hereby instructed to forthwith, at the expense of said District and as an item of maintenance chargeable to the entire district, proceed to clean out said ditch to the original [416] level thereof and maintain said ditch to said original level, construct such laterals as may be required, and lower the outlet of the ditch or make such adjustment thereof as may be required, and to do all of said work under such engineering supervision and direction as is acceptable to the Commissioners of said District and the objectors herein.

III.

That the entire expense of the work, as above outlined, is a necessary expense of maintenance to be borne by the entire Drainage District as a whole, and

It Is Further Ordered, Adjudged and Decreed that an emergency exists for the creation of the indebtedness to be incurred in connection with the above work as outlined, and in case the cost of such maintenance and repair exceeds the revenue heretofore provided for the maintenance fund of Drain-

age District No. 1 of Boundary County, Idaho, for the year 1924, the Commissioners of said District are hereby Authorized and Directed to issue warrants of said district in payment of said necessary expense and raise the funds for the payment of said warrants as provided by drainage laws of the State of Idaho, and said warrants are hereby declared to be a preferred claim against said district and a proper maintenance charge.

Done in open Court at Bonners Ferry, Idaho, this 16th day of March, 1925.

W. F. McNAUGHTON,
District Judge. [417]

State of Idaho,
County of Boundary—ss.

I, Dollie Bruce, Clerk Dist. Court, in and for the County and State aforesaid, do hereby certify the within and foregoing to be a full, true and correct copy of the whole thereof, of Findings of Fact and Conclusions of Law and Decree as the same appears of record in my office in Book 5 Judgements, at Page 582.

In testimony whereof I have hereunto set my hand and affixed my official seal, this 19th day of March, A. D. 1925.

(Seal)

DOLLIE BRUCE,
Clerk District Court,
Boundary County, Idaho.

By H. M. MacNAMARA,
Deputy. [418]

Mr. Whitla: Now we offer in evidence Plaintiff's exhibit 17, being a petition for order to show cause why the supplementary decree confirming the assessment in Mirror Lake District should not be set aside; also the decree confirming the assessment in Mirror Lake.

Mr. Wilson: This contains a decree confirming the assessment roll of all the land in the Mirror Lake Area more than two thousand acres which was a supplemental roll. This was done in 1924 and it has nothing to do with this case. We admit this was assessed, we object to it now as being immaterial.

The Court: It will be admitted.

PLAINTIFF'S EXHIBIT No. 17

Admitted Nov. 21, 1941

[Title of State Court and Cause.]

PETITION FOR ORDER
TO SHOW CAUSE

Come now Georgia A. Morrison, H. W. Mansfield, James Deyoe, Simond McDonald and Frank Zimmerman and show to this Honorable Court as follows:

1.

That your petitioner, Frank Zimmerman, is now the owner of the property formerly owned by Mar-

(Plaintiff's Exhibit No. 17 continued)

tin Peterson and situate in Drainage District No. 1 of Boundary County, Idaho.

2.

That all of your petitioners are either the original objectors or the assignees of the objectors who on August 16, 1924, filed written objections to the confirmation of the additional and supplemental assessment roll, filed in Drainage District No. 1, Boundary County, Idaho, to which original objection reference is hereby made for greater certainty; said written objection being on file and a matter of record in this action in the above entitled court.

3.

That the basis of the objection filed, as hereinabove set forth, was that land of the objectors, petitioners herein, or their assigns, was not suitably and effectively drained and that the same could not be farmed or used for any agricultural purposes.

4.

That said objection having been taken up with the commissioners of the Drainage District and their attorney, it was [419] agreed by said commissioners of Drainage District No. 1 of Boundary County, Idaho, that a stipulation be entered into between said objectors and the commissioners whereby said commissioners would within a reasonable time cause the drainage ditch in said district to be cleaned out,

(Plaintiff's Exhibit No. 17 continued)

deepened and improved so as to suitably and effectively drain the land described in said objection.

5.

That a stipulation embodying said agreement was prepared and signed and said stipulation is on file in the above entitled matter in this Court, and reference is hereby made to said stipulation for greater certainty.

6.

That said stipulation also provided that the Decree would be entered in the matter of the confirmation of said additional and supplemental assessment roll, and should contain an order to be made by the Court directing the Commissioners of Drainage District No. 1, Boundary County, Idaho, to, within a reasonable time, clean out, deepen and improve the drainage ditch as now constructed to provide for the suitable and sufficient drainage of the land of said objectors, and on the 20th day of August, 1924, this Honorable Court made a Decree in this cause which contained inter alia, the following:

It is further ordered, adjudged and decreed that the Commissioners of Drainage District No. 1 of Boundary County, Idaho, within a reasonable time, clean out, deepen and improve the present drainage ditch so as to suitably and effectively drain the land of objectors, to-wit:

(Plaintiff's Exhibit No. 17 continued)

MIRROR OR SPROLL'S LAKE AREA

Parcel No.

- 11—Accruing to Lot 2 Sec. 8, Twp. 61, N. R. 1, E.B.M.
12—Accruing to Lot 3 Sec. 8, Twp. 61, N. R. 1 E.B.M. [420]
13—Accruing to Lot 4, Sec. 5, Twp. 61 N. R. 1 E.
14—Accruing to Lot 3, Sec. 5, Twp. 61, N. R. 1 E.
6—Accruing to Lot 5, Sec. 4, Twp. 61, N. R. 1 E. less N. 20 feet
7—Accruing to Lot 1, Sec. 9, Twp. 61, N. R. 1 E.
8—Accruing to Lot 2, Sec. 9, Twp. 61, N. R. 1 E.
9—Accruing to Lot 3, Sec. 9, Twp. 61, N. R. 1 E.
3—Accruing to North 60 rods of Lot 4, Sec. 4, Twp. 61 N. R. 1 E.
4—Accruing to South 20 rods of Lot 5, Sec. 4, Twp. 61, N. R. 1 E.
5—Accruing to North 20 feet of Lot 5, Sec. 4, Twp. 61, N. R. 1 E.
10—Accruing to Lot 1, Sec. 8, Twp. 61, N. R. 1 E.”

and the Decree herein above mentioned is now on file and a matter of record in this Court, reference being hereby made to this Decree for greater certainty.

7.

That your petitioners show to this Honorable Court that a reasonable time has elapsed for the Commissioners of Drainage District No. 1 to carry out the order of this Court; that your objectors would not have consented to the confirmation of the additional and supplemental assessment roll of said commissioners, had said commissioners not represented to them that they would comply to the order

(Plaintiff's Exhibit No. 17 continued)

of the Court relative to the drainage of the above described land, and your petitioners show to this Court that the said Order of the Court has not been complied with, and that a heavy assessment has been levied against the lands belonging to and accruing to the petitioners herein; that said lands is valueless for any purpose whatsoever and your petitioners are unable to use said land for any agricultural purpose.

Wherefore, your petitioners pray that this Honorable Court shall make order citing the commissioners of Drainage District No. 1, Boundary County, Idaho, to show cause why the [421] Order of the Court, heretofore ordered and set forth, has not been complied with, and what reason there could be, if any, why the Findings of Fact and Conclusions of Law and Decree heretofore entered in the matter of said additional and supplemental assessment roll should not be vacated and set aside.

O. C. WILSON,

Attorney for Petitioners

Residence and P. O. Address

Bonnors Ferry, Idaho. [422]

State of Idaho,

County of Boundary—ss.

Frank Zimmerman, being first duly sworn on oath, deposes and says, that he is one of the above-named petitioners; that he has read the above and

(Plaintiff's Exhibit No. 17 continued)

foregoing Petition and knows the contents thereof and believes the facts therein stated to be true.

FRANK ZIMMERMAN.

Subscribed and sworn to before me this 12th day of December, 1924.

(Seal) O. C. WILSON,

Notary Public for State of Idaho. Residing at Bonners Ferry.

State of Idaho,

County of Boundary—ss.

Filed Dec. 13, 1924 at o'clockM.

DOLLIE BRUCE,

Clerk of District Court,

By

Deputy. [[423]]

[Title of State Court and Cause.]

STIPULATION

It is stipulated between E. W. Wheelan, Attorney for Drainage District No. 1. and O. C. Wilson, Attorney for Georgia A. Morrison, Martin Peterson, H. W. Mansfield, James DeYoe and Simon McDonald, objectors who have heretofore filed objections to the confirmation of the Additional and Supplemental Assessment Roll filed herein, as follows:

(Plaintiff's Exhibit No. 17 continued)

1. That the Commissioners of the said Drainage District No. 1, of Boundary County, Idaho will, within a reasonable time clean out, deepen and improve the present drainage ditch so as to suitably and effectively drain the land described in the objections filed herein by the above named parties, and that in the decree to be entered herein, there shall be inserted an order to be made by the court, directing the Commissioners to clean out, deepen, and improve the drainage ditch as now constructed within a reasonable time, to provide for the suitable and sufficient drainage of the land of said objectors, covered by the objections filed herein.

2. That all of the objections of the said objectors be withdrawn and dismissed.

Dated at Bonners Ferry, Idaho this 20th day of August, 1924.

E. W. WHEELAN,
Attorney for Commissioners
P. O. Address,
Sandpoint, Idaho.

O. C. WILSON,
Attorney for Objectors
P. O. Address,
Bonners Ferry, Idaho.

(Plaintiff's Exhibit No. 17 continued)

State of Idaho

County of Boundary—ss.

Filed Aug. 20, 1924, at 1:45 o'clock, P. M.

DOLLIE BRUCE,

Clerk of District Court.

By H. M. MacNAMARA,

Deputy. [424]

[Title of State Court and Cause.]

DECREE

The Commissioners' Supplemental Report in the above entitled matter came regularly on to be heard before Honorable Herman H. Taylor one of the Judges of the above entitled Court, objections or remonstrances having been filed by Georgia A. Morrison, Martin Peterson, H. W. Mansfield, James DeYoe and Simon McDonald and all of said parties through their Attorney having filed a stipulation entered into with the Commissioners of said Drainage District, for the dismissal of said objections. Witnesses were sworn and examined and documentary evidence was introduced, and upon consideration of said Supplemental Report of the Commissioners, the records and files in said proceeding, the stipulation entered into between the objectors and the District and the evidence introduced, the Court having made and filed herein Findings of Fact and Conclusions of Law.

(Plaintiff's Exhibit No. 17 continued)

Wherefore, It is Ordered, Adjudged and Decreed that all objections of the objectors be, and the same are hereby dismissed. It is further ordered adjudged and decreed that Exhibit "D" attached to the Supplemental Report of the Commissioners is a full, true and correct list of the owners and parties interested in the land included in said Drainage District, and subject to assessment as set forth in the Assessment Roll filed as part of said Supplemental Report, and the description of each parcel of the reclaimed area of Sproll's or Mirror Lake, or Fry Lake, accruing to each Governmental subdivision bordering on either of said Lakes is established as follows:

The following is a description of each parcel or subdivision into which the reclaimed area of Sproll's or Mirror Lake has been divided, but there is excluded from each of said subdivisions any portion of the drainage canal or ditch, or any lateral ditch, as the same is now constructed which may lie within the boundaries of any of said subdivisions, with a strip of land fifty (50) feet in width, being ten (10) feet on the southerly side and forty (40) feet on the northerly side of the center line of said main ditch as said ditch is hereinafter described, to-wit: [425]

1.

That portion of the reclaimed area accruing to Lot 2, Section 4, Township 61 North, Range 1 East B. M., to-wit:

(Plaintiff's Exhibit No. 17 continued)

Beginning at the meander corner to fractional Section 4, T. 61 N., R. 1 E. B. M., and fractional Section 33, Township 62 N., R. 1 E.B.M.; thence S. $77^{\circ} 52'$ W. 1441 feet to a point; thence S. $0^{\circ} 6'$ W. 989 feet to a point; thence east 1460 feet, more or less to a point of intersection with the Government meander of the easterly boundary of said Lake, which point is the S.W. corner of said Lot 4, thence N. 4° W. along the said Government Meander 1297.3 feet to the point of beginning.

The area enclosed is 38.82 acres, more or less.

Owner: Henry Wendell

Mortgagee: Chas. Trautfether.

2.

That portion of the reclaimed area accruing to Lot 3, Section 4, Township 61 North, Range 1 East B. M., to-wit:

Begining at a point which is the southwest corner of Lot 2, and the northwest corner of Lot 3, Section 4, Township 61 N., R. 1 E. B. M.; thence along the westerly line of said Lot 3, south 4° E. 346.7 feet, south 7° W. 983 feet to the southwest corner of said Lot 3; thence west on the east and west center line of said Section 4, 1250.5 feet to a point; thence north $6^{\circ} 18'$ W. 1320 feet to a point; thence east 1460 feet to the point of beginning.

The area enclosed is 39.64 acres, more or less.

Owner: Henry Wendell

Mortgagee: Chas. Trautfether.

(Plaintiff's Exhibit No. 17 continued)

3.

That portion of the reclaimed area accruing to the north sixty (60) rods of Lot 4, Section 4, Twp. 61 North, Range 1 East B. M., to-wit:

Beginning at a point which is the intersection of the east and west center line of Section 4, Twp. 61 North, Range 1 East B. M., and the Government meander on the easterly boundary of Sproll's Lake, which point is south 4° West 1644 feet and thence South 7° West 983 feet from the meander corner of fractional section 4 as above mentioned and fractional section 33, Twp. 62 North, Range 1 East B. M., thence west on said east and west center line of said Section 4, 1250.5 feet to the easterly side of the Main Lateral Drainage District; thence southerly along the easterly side of said Drainage Ditch 990 feet to a point; thence east 1343.4 feet to the Government Meander line on the easterly side of said Sproll's Lake; thence along the said Government Meander North $8^{\circ} 15'$ West 510.2 feet to a point; thence North 7° East 469 feet to the point of beginning.

The area enclosed is 28.73 acres, more or less.

Owner: H. W. Mansfield.

4.

That portion of the reclaimed area accruing to the south twenty (20) rods of Lot 4, Section 4, Twp. 61 North, Range 1 East B.M. to-wit:

Beginning at a point which is the intersection of the Government Meander of the easterly boundary

(Plaintiff's Exhibit No. 17 continued)

of Sproll's Lake and the east and west line which is 330 feet north of the South boundary of Lot 4, Section 4, T. 61 N., R. 1 E. B. M.; thence west 1343.4 feet to the easterly line of the Main Lateral Drainage Ditch right of way; thence southerly along said right of way 330 feet to a point on the south line, extended, of said Lot 4; thence, east 1420 feet to the Government meander and the southwest corner of said Lot 4; thence northerly to the point of beginning. [426]

The area enclosed is 9.64 acres, more or less.

Owner: James A. DeYoe

Mortgagee: Federal Land Bank.

5.

That portion of the reclaimed area accruing to the north twenty (20) feet of Lot 5 of Section 4, Twp. 61 North, Range 1 East B. M., to-wit:

Beginning at a point on the Government Meander which point is the northwest corner of Lot 5, Section 4, Twp. 61 N., R. 1 E.B.M.; thence West 1420 feet to a point on the easterly line of the Main Lateral Drainage Ditch right of way; thence southerly along said right of way, 20 feet to a point; thence east 1423 feet to a point on the said Government Meander which point is 20 feet south of the North line of said Lot 5; thence northerly along said meander to the point of beginning.

(Plaintiff's Exhibit No. 17 continued)

The area enclosed is .83 acres, more or less.

Owner: James A. DeYoe

Mortgagee: Federal Land Bank.

6.

That portion of the reclaimed area accruing to Lot 5, Section 4, Township 61 North, Range 1 East B. M., less the north 20 feet, to-wit:

Beginning at the meander corner to fractional sections 4 and 9, Township 61 North, Range 1 East B. M., thence following the Government Meander around the easterly side of Sproll's Lake, north $41\frac{1}{2}^{\circ}$ east 330 feet, North 13° East 284; North 34° West 502 feet; north $79\frac{3}{4}^{\circ}$ West 792 feet; North $81\frac{1}{2}^{\circ}$ West 258.8 feet to a point 20 feet south of the North line of Lot 5, Section 4, Township 61 North, Range 1, East B.M.; thence west 1423 feet to the easterly side of the Main Lateral Drainage Ditch; thence, southerly along the easterly side of said ditch 450 feet to a point; thence southeasterly 2438.2 feet to the point of beginning.

The area enclosed, exclusive of the area within the Great Northern right of way across the above described land, is 38.95 acres, more or less.

Owner: Martin Peterson.

7.

That portion of the reclaimed area accruing to Lot 1, Section 9, Township 61 North, Range 1 East B. M., to-wit:

(Plaintiff's Exhibit No. 17 continued)

Beginning at the meander corner to fractional sections 4 and 9, Township 61 North, Range 1 East B. M.; thence following the Government meander around the easterly and southerly side of Sproll's Lake South $41\frac{1}{2}^{\circ}$ West 208 feet; south 70° west 197.6 feet to intersection with the North and south center line of said Section 9, thence North 61° West 2335 feet to a point where the main Lateral Drainage Ditch turns northerly; thence southeasterly 2438.2 feet to the point of beginning.

The area enclosed, exclusive of the Great Northern right of way across the above described land, is 7.65 acres, more or less.

Owner: Roger-Youmans Lumber Company.

8.

That portion of the reclaimed area accruing to Lot No. 2, Section 9, Township 61 North, Range 1 East B. M., to-wit:

Beginning at a point which is the intersection of the Government meander of the southerly boundary of Sproll's or Mirror Lake and the north and south center line of Section 9, Township 61 North, Range 1 East B. M., which point is S. $41\frac{1}{2}^{\circ}$ W. 208 feet, and S. 70° W. 197.6 feet from the meander corner to Fractional sections 4 and 9 of said [427] Township and Range; thence N. 61° W. 1575 feet to a point; thence S. 830 feet, more or less, to the N.W. corner of Lot 2 of said Sec. 9; thence easterly along

(Plaintiff's Exhibit No. 17 continued)

the said Government meander to the point of beginning.

The area enclosed, exclusive of the Great Northern right of way, across the above described area is 10.36 acres, more or less.

Owner: Martin Peterson.

9.

That portion of the reclaimed area accruing to Lot 3 of Section 9, Township 61 North, Range 1 East B. M., to-wit:

Beginning at the meander corner to fractional Sections 8 and 9 township 61 North, Range 1 East B. M.; thence north along the westerly line extended of said Sec. 9, 1602 feet to the southerly side of the main Lateral drainage ditch, thence easterly along the southerly side of the said Drainage ditch 675 feet to a point where said ditch turns northerly; thence S. 61° E. 760 feet to a point; thence S. 830 feet, more or less, to the northeast corner of Lot 3 of said Sec. 9; thence, westerly following the Government meander along the southerly side of Sproll's Lake to the point of beginning.

The area enclosed is 57.32 acres, more or less.

Owner: Martin Peterson.

10.

That portion of the reclaimed area accruing to Lot 1, Section 8, Township 61 North, Range 1 East B. M., to-wit:

(Plaintiff's Exhibit No. 17 continued)

Beginning at the meander corner to fractional Sections 8 and 9, Twp. 61 North, Range 1 E.B.M.; thence following the said Government Meander in said Section 8, North 53° West 313 feet to a point; S. 81° West 396 feet to a point; South $88^{\circ} 45'$ West 672.2 feet to a point on the west line of said Lot 1, thence North 1790 feet to the southerly side of the Main Lateral Drainage Ditch as now constructed; thence easterly along the southerly side of said ditch 1332 feet to the east line extended of said Section 8; thence south 1602 feet to the point of beginning.

The area enclosed is 48.84 acres, more or less.

Owner: Simon McDonald

Mortgagee: Oregon Mortgage Co.

11.

That portion of the reclaimed area accruing to Lot 2, Section 8, Township 61 North, Range 1 East B. M., to-wit:

Beginning at a point on the Government Meander line in Section 8, Twp. 61 N., R. 1 E. B. M., which point is 1313 feet W. and 111.8" N. of the meander corner to fractional sections 8 and 9 of said Township and Range; thence along the above government meander in said Sec. 8, S. $88^{\circ} 45'$ W. 515.8 feet; N. 60° W. 726 feet; N. 27° W. 172 feet; N. 85° W. 100 feet to the northwest corner of Lot 2 of said Section 8; thence N. 2503.2 feet to the southerly side of the main lateral ditch right of way; thence easterly

(Plaintiff's Exhibit No. 17 continued)

along the southerly side of said ditch right of way, 1872 feet to a point; thence S. 1790 feet to the point of beginning.

The area enclosed is 66.39 acres, more or less.

Owner: Georgia A. Morrison. [428]

12.

That portion of the reclaimed area accruing to Lot 3, Section 8, Township 61 North, Range 1 East B. M., to-wit:

Beginning at the Government meander corner to fractional Sections 5 and 8, Twp. 61 N., R. 1 E.B.M.; thence east along the section line, extended, between said Sections 5 and 8; 475 feet to a point; thence S. 174.7 feet to an intersection with the Government meander along the south side of Sproll's Lake; thence northwesterly along said meander to the point of beginning.

The area enclosed is 1.65 acres, more or less.

Owner: Georgia A. Morrison.

13.

That portion of the reclaimed area accruing to Lot 4, Section 5, Township 61 North, Range 1 East B. M., to-wit:

Beginning at the meander corner to fractional sections 5 and 8 Twp. 61 N., R. 1 E.B.M.; thence east along the section line extended, between said sections 5 and 8 a distance of 475 feet to a point; thence, north 1320 feet to a point; thence West 1150

(Plaintiff's Exhibit No. 17 continued)

feet to an intersection with the Government Meander of Sproll's Lake, which point is the N. E. corner of Lot 4, of Sec. 5 of the above Township and Range; thence southeasterly following the above meander to the point of beginning.

The area enclosed is 23.39 acres, more or less.

Owner: Georgia A. Morrison.

14.

That portion of the reclaimed area accruing to Lot 3, Section 5, Township 61 North, Range 1 East B. M., to-wit:

Beginning at the meander corner to fractional sections 5 and 6, Township 61 North, Range 1 East B. M.; thence N. 33° E. 1119 feet to a point on the southwesterly side of the main lateral drainage ditch right of way; thence, following in a southeasterly direction along the southwesterly side of said right of way, 2334 feet to a point; thence, south 1008.5 feet to a point; thence, west 1150 feet to an intersection with the Government meander of Sproll's Lake, which is the S.E. corner of Lot No. 3 of Section 5 of the above Township and Range; thence northwesterly, following the said meander to the point of beginning.

The area enclosed is 55.02 acres, more or less.

Owner: Georgia A. Morrison.

(Plaintiff's Exhibit No. 17 continued)

15.

That portion of the reclaimed area accruing to Lot 7, Section 6, Twp. 61 North, Range 1 East B. M., to-wit:

Beginning at the meander corner to fractional Sections 5 and 6, Twp. 61 North, Range 1 East B. M.; thence along the said Government meander in Section 6, North 42° West 452.2 feet to a point on the east and west center line of said Section 6; thence North 46° East 1041.4 feet to a point on the southwesterly side of the main lateral drainage ditch, thence south 33° West 1119 feet to the point of beginning.

The area enclosed is 5.81 acres, more or less.

Owner: B. Nels Peterson. [429]

16.

That portion of the reclaimed area accruing to Lot 1, Section 6, Twp. 61 N., R. 1 E. B. M., to-wit:

Beginning at the closing corner of Sections 5 and 6, Twp. 61 N., R. 1 E. B. M.; thence southwesterly following the Government meander to the southeast corner of Lot 1 of said Section 6; thence, east 990 feet to a point on the westerly side of the main lateral drainage ditch right of way; thence, northerly and northwesterly along the westerly and southwesterly sides of said right of way, 1435.8 feet to a point 10 feet west of the corner for sections 31 and 32, Twp. 62 N., R. 1 E.B.M., on the 13th Stand-

(Plaintiff's Exhibit No. 17 continued)

ard parallel north; thence west 190 feet to the point of beginning.

The area enclosed is 23.55 acres, more or less.

Owner: Samuel M. Murphy.

Holder Contract to Purchase: John A. Hanson.

17.

That portion of the reclaimed area accruing to Lot 6, Section 6, Twp. 61 N., R. 1 E.B.M., to-wit:

Beginning at the southeast corner of Lot 6, Section 6, Twp. 61 N., R. 1 E.B.M.; thence N. 46° E. 1041.4 feet to a point on the westerly side of the main lateral drainage ditch right of way; thence northerly along the westerly side of said right of way 725 feet to a point; thence West 990 feet to the N.E. Corner of said Lot 6; thence southerly along the Government meander of Sproll's Lake to the point of beginning.

The area enclosed is 27.14 acres, more or less.

Owner: Samuel M. Murphy

Holder Contract to Purchase: John A. Hanson.

18.

That portion of the reclaimed area accruing to Lot 1, Section 5, Township 61 N., R. 1 East B. M., to-wit:

Beginning at the meander corner on the 13th Standard Parallel North, which is the northeast corner of Lot 1 of Sec. 5, T. 61 N., R. 1 E.B.M.; thence S. 79° 28' E. 1632 feet to a point; thence

(Plaintiff's Exhibit No. 17 continued)

S. $0^{\circ} 06'$ W. 986 feet to a point thence S. $1^{\circ} 57'$ E. 1270 feet to a point, 50 feet north of the center of the main Lateral Drainage Ditch as now constructed; thence southwesterly parallel to and 50 feet distant from the center line of said ditch 70.7 feet at a point; thence, following down said Main Lateral Drainage ditch on the right hand side thereof and 40 feet from the center line thereof 5675 feet to a point on the north and south center line of said Section 5; thence N. 2940 feet to the $\frac{1}{4}$ corner for the north side of said Section; thence east along the north line extended of said Section 5, to the Standard Meander corner to fractional section 32, T. 62 N., R. 1 East B.M., and the above Section 5, and the N.W. corner of said Lot 1; thence, following the meanders in said Section 5, south 1241 feet; S. 14° E. 1056 feet; thence S. 63° E. 990 feet; N. 28° W. 924 feet; N. 1° E. 1122 feet; N. 14° W. 792 feet to the point of beginning.

The area enclosed is 262.29 acres, more or less.

Owner: Simon McDonald

Mortgagee: Oregon Mortgage Company. [430]

19.

That portion of the reclaimed area accruing to Lot 2 of Section 5, Township 61 North, Range 1 East B. M., to-wit:

Beginning at the meander corner which is the northeast corner of Lot 2, Section 5, Twp. 61 N.,

(Plaintiff's Exhibit No. 17 continued)

R. 1 E.B.M.; thence east on the 13th Standard Parallel North 1051.9 feet to the $\frac{1}{4}$ corner for said Sec. 5; thence S. 2940 feet to a point on the northerly line of the Main Lateral Drainage Ditch right of way; thence northwesterly and northerly along the said right of way approximately 4495 feet to an intersection with the said 13th Standard Parallel north; thence east on said Standard parallel to the meander corner which is the N.W. corner of said Lot 2; thence following the Government meander around the said Lot 2, S. $8^{\circ} 15'$ E. 891 feet; S. 18° E. 792 feet; S. 58° E. 264 feet; N. $74^{\circ} 30'$ E. 126 feet; N. 15° W. 1188 feet; N. 4° W. 594 feet to the point of beginning.

The area enclosed is 103.11 acres, more or less.

Owner: Simon McDonald

Mortgagee: Oregon Mortgage Company.

20.

That portion of the reclaimed area accruing to Lot 1, Section 32, Township 62 North, Range 1 East B.M., to-wit:

Beginning at the S.W. corner of Lot 1, Section 32, Twp. 62 N., R. 1 E. B. M., said corner being common also to Lot No. 5 of said Section; thence, West 700 feet to an intersection with the north and south center line of said Section 32; thence N. on said north and south center line 630 feet to the Government Meander line and Lot corner common to Lots 1 and 2 of said Sec. 32 thence easterly and south-

(Plaintiff's Exhibit No. 17 continued)

easterly along said meander to the point of beginning.

The area enclosed is 8.7 acres, more or less.

Owner: Simon McDonald

21.

That portion of the reclaimed area accruing to Lot 2, Section 32, Township 62 North, Range 1 East B.M., to-wit:

Beginning at the S.E. corner of Lot 2, Section 32, Township 62 North, Range 1 East B. M.; thence south along the north and south center line of said Section 32; 630 ft. to a point; thence west 1320 feet to a point; thence N. 240 feet to the S.W. corner of said Lot 2; thence, following the Government meander northeasterly and east to the point of beginning.

The area enclosed is 13.25 acres, more or less.

Owner: Simon McDonald.

22.

That portion of the reclaimed area accruing to Lot 3, Section 32, Township 62 North, Range 1 East B.M., to-wit:

Beginning at the S.E. corner of Lot No. 3, Section 32, Township 62 North, Range 1 East B.M., which corner is also common to Lot No. 2 of said Section 32; thence S. 240 feet to a point; thence west 270 feet to the Government Meander; thence following said meander northwesterly and northeasterly to the point of beginning.

The area enclosed is .89 acres, more or less.

(Plaintiff's Exhibit No. 17 continued)

Also area described as follows: Beginning at a point which is 53.1 feet north and 14.2 feet E. from the S.W. corner of said Section 32; thence along the Government Meander in said Section 32, N. 15° E. 1331 feet; N. 71° E. 462 feet; S. 59° 45' E. 165 feet to the south line of said Lot 3; thence W. 235 feet to a point; thence, southerly to a [431] point on the 13th Standard parallel North which point is 527.6 feet east of the S.W. corner of said Sec. 32; thence West 470 feet on said Standard parallel to the easterly line of the Main Lateral Drainage Ditch right of way; thence northwesterly to the point of beginning.

The area enclosed is 12.67 acres, more or less.

Owner: Simon McDonald.

23.

That portion of the reclaimed area accruing to Lot 4, Section 32, Township 62 North, Range 1 East B. M., to-wit:

Beginning at the meander corner which is the S.E. corner of Lot 4, Sec. 32, Twp. 62 N., R. 1 E.B.M.; thence east 1227.9 feet to the $\frac{1}{4}$ corner set for the south line of said Section 32; thence N. 1320 feet to a point; thence West 1560 feet to the government meander and the N. E. corner of said Lot 4; thence southerly along the said Government meander to the point of beginning.

The area enclosed is 37.40 acres, more or less.

(Plaintiff's Exhibit No. 17 continued)

Also an area described as follows:

Beginning at the meander corner which is the S. W. corner of said Lot 4, thence west 527.6 feet to a point; thence, northerly 1320 feet to the north line of said Lot 4; thence east 235 feet to the Government Meander and the N. W. corner of said Lot 4; thence, southerly along said meander to the point of beginning.

The area thus enclosed is 11.79 acres, more or less.

The total area accruing to said Lot 4 is 49.19 acres, more or less.

Owner: Simon McDonald.

24.

That portion of the reclaimed area accruing to Lot 5, Section 32, Township 62 North, Range 1 East B. M., to-wit:

Beginning at the Government meander corner which is the southwest corner of Lot 5, Section 32, Township 62 North, Range 1 E.B.M.; thence west 992. feet to the $\frac{1}{4}$ section corner set for the south line of said Section 32; thence N. 1320 feet to a point; thence east 700 feet to the Government Meander and the northwest corner of said Lot 5; thence, southerly along said meander to the point of beginning.

The area enclosed is 24.70 acres, more or less.

Owner: Henry L. Shively

Holder Contract to Purchase; Harry S. Row.

(Plaintiff's Exhibit No. 17 continued)

25.

That portion of the reclaimed area accruing to Lot 6, Section 32, Township 62 North, Range 1 East B. M., to-wit:

Beginning at the meander corner to fractional Sections 32 and 33 Twp. 62 North, Range 1 East B. M., thence south on the Section line extended between said Sections 32 and 33, 734.7 feet to a point on the 13th Standard parallel North, thence east along said parallel 467.5 feet to a point; thence South $0^{\circ} 06'$ West 300 feet to a point; thence North $79^{\circ} 28'$ West 1632 feet to the meander corner on said Standard parallel 63 chains east of the Standard section corner; said Section 32 and Section 31 of the same Township and Range; thence following the Government meander in said Sections 32 North $34^{\circ} 30'$ East 528 feet; North 70° east 876 feet to the point of beginning. [432]

The area enclosed is 18.51 acres, more or less.

Owner: Henry L. Shively.

Holder Contract to Purchase: Harry S. Row.

26.

That portion of the reclaimed area accruing to Lot 2, Section 33, Township 62 North, Range 1 East B. M., to-wit:

Beginning at the meander corner to fractional sections 32 and 33 Twp. 62 North, Range 1 East B. M., thence following the Government meander in said Section 33 North, 69° East 1056 feet; North 82° East 331.4 feet to the east line of Lot

(Plaintiff's Exhibit No. 17 continued)

2 of said Section 33; thence South 1260 feet to the 13th Standard parallel North; thence West 1320 feet to a point; thence North 734.7 feet to the point of beginning.

The area enclosed is 29.5 acres, more or less.

Owner: Martin Peterson.

27.

That portion of the reclaimed area accruing to Lot 1, Section 33, Township 62 North, Range 1 East B. M., to-wit:

Beginning at the Standard meander corner to fractional Section 33; thence South $77^{\circ} 52'$ West 1441 feet to a point; thence North $0^{\circ} 06'$ East 300 feet to a point on the 13th Standard parallel, North; thence East 852.5 feet to a point; thence north 1260 feet to a point on the Government meander of Sproll's lake; thence following said Government meander North 82° East 193.8 feet; S. 42° East 396 feet; S. $7^{\circ} 30'$ East 900 feet to the point of beginning.

The area enclosed is 16.51 acres, more or less.

Owner: James Henry McDonald.

Mortgagee: Mrs. B. F. Shaver.

The following is a description of each parcel or subdivision into which the reclaimed area of Fry's Lake has been divided, but there is excluded from each of said subdivisions any portion of the drainage canal or ditch, or any lateral ditch,

(Plaintiff's Exhibit No. 17 continued)

as the same is now constructed which may lie within the boundaries of any of said subdivisions, with a strip of land fifty (50) feet in width, being twenty-five (25) feet on each side of the center line of said main ditch as said ditch is hereinafter described, to-wit:

I.

That portion of the reclaimed area accruing to Lot 3, Section 29, Township 62 North, Range 1 East B. M., excepting the east 400 feet thereof, to-wit:

Beginning at a point which is north $88\frac{1}{2}^{\circ}$ West 400; 24 feet from the Government Meander which is the Southeast corner of Lot 3, Section 29, Twp. 62 North, Range 1 East B. M.,; thence south on a line 400 feet distant and parallel with the North and south center line of said Section 29 1638.7 feet to a point; thence north $39^{\circ} 30'$ West 1011.2 feet to a point; thence westerly 270 feet to a point; thence north 520 feet to a point on the Government Meander and the southwest corner of said Lot 3; thence easterly along said meander to the point of beginning.

The area enclosed is 18.99 acres, more or less.

Owner: Martin Woldson

Holder Contract to Purchase: John Davidson [433]

2.

That portion of the reclaimed area accruing to Lot 4, Section 29, Township 62 North, Range 1 East B. M., to-wit:

(Plaintiff's Exhibit No. 17 continued)

Beginning at the Government meander corner which is the Southwest corner of Lot 4, Section 29, Township 62 North, Range 1 East, B. M.; thence easterly along the Government meander 1320 feet to the southeast corner of said lot 4; thence south 520 feet to a point; thence westerly on a line to intersect the west line of said Section 29 at a point 827 feet south of the Northwest corner of said section; thence north to the point of beginning.

The area enclosed is 15.42 acres, more or less.

Owner: Martin Woldson.

Holder Contract to Purchase: John Davidson

3.

That portion of the reclaimed area accruing to Lot 5, Section 29, Township 62 North, Range 1 East B. M., to-wit:

Beginning at the Government Meander corner which is the Northwest corner of Lot 5, Section 29, Township 62 North, Range 1 East B. M.; thence southeasterly along the Government meander to intersect the center line of said Section 29 at the southeast corner of said Lot 5; thence east to the established center of said Section 29; thence north $39^{\circ} 30'$ West 1640 feet to a point; thence westerly on a line to intersect the west line of said Section 29, at a point 827 feet south of the northwest corner thereof; thence south to the point of beginning.

The area enclosed is 34.99 acres, more or less.

Owner: Martin Woldson.

Holder Contract to Purchase: John Davidson

(Plaintiff's Exhibit No. 17 continued)

4.

That portion of the reclaimed area accruing to Lot 6, Section 29, Township 62 North, Range 1 East B. M., to-wit:

Beginning at the northeast corner of Lot 6, Section 29, Township 62 North, Range 1 East B. M.; thence east on the east and west center line of said section to the established center thereof; thence south on the north and south center line of said Section 1320 feet to a point; thence west 640 feet to the southeast corner of said Lot 6; thence northwesterly along the Government meander to the point of beginning.

The area enclosed is 31.68 acres, more or less.

Owner: Martin Woldson

Holder Contract to Purchase: John Davidson

5.

That portion of the reclaimed area accruing to Lot 7, Section 29, Township 62 North, Range 1 East B. M., to-wit:

Beginning at the northeast corner of Lot 7, Section 29, Township 62 North, Range 1 E. B. M.; thence east 640 feet to the North and south center line of said Section 29; thence south 630 feet to the Government meander and the corner of said Lot 7; thence northwesterly along the said Government meander to the point of beginning.

(Plaintiff's Exhibit No. 17 continued)

The area enclosed is 3.05 acres, more or less.

Owner: Martin Woldson.

Holder Contract to Purchase: John Davidson [434]

6.

That portion of the reclaimed area accruing to a strip of land in Lot 3 of Section 29, Township 62 North, Range 1 East B. M., said strip of land being 14 feet wide on the west end, 16 feet wide on the east end and bordering the north shore of said Fry's Lake for a distance of 400.24 feet, measured from the southeast corner of said Lot 3, described as follows, to-wit:

Beginning at the southeast corner of Lot 3, Section 29, Township 62 North, Range 1 East B. M.; thence south along the north and south center line of said Section 29, 1958 feet to the Center of said Section 29; thence N. $39^{\circ} 30'$ W. 628.8 feet to a point; thence north, parallel with and 400 feet distant from the said north and south center line 1638.7 feet to a point on the Government Meander line on the north side of Fry's Lake; thence S. $88\frac{1}{2}^{\circ}$ E. 400.24 feet to the point of beginning.

The area enclosed is 13.87 acres, more or less.

Owner: John W. Knoles.

7.

That portion of the reclaimed area accruing to Lot 5, Section 30, Township 62 North, Range 1 East B. M., to-wit:

(Plaintiff's Exhibit No. 17 continued)

Beginning at the Government Meander corner on the north side of Fry's Lake which corner is common to fractional Sections 29 and 30 T. 62 N., R. 1 E. B. M.; thence North 87° W. 88 feet; north 20° W. 330 feet; north $48\frac{1}{4}^{\circ}$ W. 594 feet; South 20° W. 403 feet; south 60° E. 528 feet; South 48° E. 564 feet to the southeast corner of Lot 5 of said Section 30; thence east to a point on the east line of said Section 30; thence north to the point of beginning.

The area enclosed is 11.2 acres, more or less.

Owner: Oscar Stenberg.

8.

That portion of the reclaimed area accruing to Lot 6, Section 30, Township 62 North, Range 1 East B. M., to-wit:

Beginning at the meander corner of fractional sections 29 and 30, Twp. 62 N., R. 1 East B. M., on the south side of Fry's Lake; thence following the Government meander in said Section 30 North 48° W. 70 feet to the northeast corner of Lot No. 6 Section 30, Township 62 North, Range 1 East B. M.; thence east to a point on the east line of said Section 30; thence south to the point of beginning.

The area enclosed is $5/100$ acres, more or less.

Owner: Oscar Stenberg.

(Plaintiff's Exhibit No. 17 continued)

9.

That portion of the reclaimed area accruing to the Northwest Quarter (NW $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section 28, Township 62 North, Range 1 East B. M., to-wit:

Beginning at a point on the Government Meander of Fry Lake which point is 248.1 feet west of the established center of Section 28, Township 62 North, Range 1 East B. M.; thence west 1056.7 feet to a point; thence southeasterly 1680 feet to a point on the Government Meander and the southwest corner of the Northwest Quarter (NW $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of said Section 28; thence northerly following the said Government meander to the point of beginning. [435]

The area enclosed is 19.30 acres, more or less.

Owner: Simon McDonald

10.

That portion of the reclaimed area accruing to Lot 8, Section 28, Township 62 North, Range 1 East B. M., to-wit:

Beginning at a point on the Government Meander on the south side of Fry's Lake, which point is the southwest corner of Lot 8, Section 28, Township 62 N., R. 1 East B. M.; thence northwesterly 1330 feet on a line to the established $\frac{1}{4}$ corner for the west side of said Section 28; thence east 1304.7 feet to a point; thence southeasterly 1680 feet to the Government meander and the northeast corner of

(Plaintiff's Exhibit No. 17 continued)

said Lot No. 8; thence following the said Government meander westerly to the point of beginning.

The area enclosed is 43.40 acres, more or less.

Owner: Simond McDonald

Mortgagee: Henry A. Moore.

11.

That portion of the reclaimed area accruing to Lot 9, Section 28 Township 62 North, Range 1 East B. M., to-wit:

Beginning at the meander corner to fractional Sections 28 and 29, T. 62 N., R. 1 E. B. M.; thence north 1405 feet to the established $\frac{1}{4}$ corner for the west side of said Section 28; thence southeasterly 1330 feet to the Government Meander and corner for Lot No. 9 of said Section 28; thence southwesterly along said meander to the point of beginning.

The area enclosed is 4.50 acres, more or less.

Owner: Simon McDonald

Mortgagee: A. C. McKinnon.

12.

That portion of the reclaimed area accruing to Lot 9, Section 29, Township 62 N., R. 1 East B. M., to-wit:

Beginning at the Government Meander corner for fractional Sections 28 and 29 on the south boundary of Fry's Lake in T. 62 N., R. 1 East B. M.; thence north 1405 feet to the established $\frac{1}{4}$ corner for

(Plaintiff's Exhibit No. 17 continued)

the east line of said Section 29; thence west 1334.5 feet to a point; thence south 1400 feet to the Government meander and the northwest corner of Lot 9 of said Section 29; thence easterly along the said Government meander to the point of beginning.

The area enclosed is 43.42 acres, more or less.

Owner: Simon McDonald

Mortgagee: A. C. McKinnon.

13.

That portion of the reclaimed area accruing to Lot 8, Section 29 Township 62 North, Range 1 East B. M., to-wit:

Beginning at the northeast corner of Lot No. 8, Section 29, T. 62 N., R. 1 East B. M.; thence North 1400 feet to the east and west center line of said Section 29; thence west 1334.5 feet to the established center of said section; thence south along the north and south center line of said Section 29, 1975 feet to the Government Meander line and the northwest corner of said Lot 8; thence northeasterly along said Government meander to the point of beginning.

The area enclosed is 47.28 acres, more or less.

Owner: Simon McDonald

Mortgagee: A. C. McKinnon. [436]

(Plaintiff's Exhibit No. 17 continued)

14.

That portion of the reclaimed area accruing to Lot 3, Section 28, T. 62 N., R. 1 East B. M., to-wit:

Beginning at the meander corner which is the southwest corner of Lot 3, Section 28, Township 62 North, Range 1 East B. M.; thence south 1397 feet to the established $\frac{1}{4}$ corner for the west side of said Section 28; thence east 1304.7 feet to a point; thence north 940 feet to the Government Meander and the Southeast corner of said Lot 3; thence northwesterly along said meander to the point of beginning.

The area enclosed is 37.14 acres, more or less.

Owner: Martin Woldson.

Holder Contract to Purchase: John Davidson.

15.

That portion of the reclaimed area accruing to Lot 4, Section 28, Township 62 North, Range 1 East B. M., to-wit:

Beginning at a point on the Government Meander of Fry's Lake which point is 248.1 feet west of the established center of Section 28, Township 62 N., R. 1 E. B. M.; thence west along the east and west center line of said Section 28, 1056.7 feet to a point; thence north 940 feet to the Government meander and the southwest corner of Lot 4 of said Section 28; thence southeasterly along said Government meander to the point of beginning.

(Plaintiff's Exhibit No. 17 continued)

The area enclosed is 14.54 acres, more or less.

Owner: Martin Woldson.

Holder Contract to Purchase: John Davidson.

16.

That portion of the reclaimed area accruing to Lot 1 Section 29, Township 62 North, Range 1 East B. M., to-wit:

Beginning at the meander corner on the north boundary of Fry's Lake which corner is common to fractional sections 28 and 29, T. 62 N., R. 1 East B. M., thence south 1397 feet to the established $\frac{1}{4}$ corner for the east line of said Section 29; thence west 1334.5 feet to a point; thence North 1650 feet to the Government Meander and the Southwest corner of Lot No. 1 of said Section 29; thence, easterly along said Government Meander to the point of beginning.

The area enclosed is 45.6 acres, more or less.

Owner: Martin Woldson.

Holder Contract to Purchase: John Davidson

17.

That portion of the reclaimed area accruing to Lot 2, Section 29, Township 62 North, Range 1 East B. M., to-wit:

Beginning at the Government Meander corner which is the southwest corner of Lot No. 2, Section 29, T. 62 N., R. 1 East B. M.; thence south

(Plaintiff's Exhibit No. 17 continued)

along the north and south center line of said Section 29 1958 feet to the established center of said Section; thence east 1334.5 feet to a point; thence north 1650 feet to the Government meander and the southeast corner of said Lot 2; thence westerly along said meander to the point of beginning.

The area enclosed is 48.49 acres, more or less.

Owner: Martin Woldson.

Holder Contract to Purchase: John Davidson. [437]

It Is Further Ordered, Adjudged and Decreed that the Assessment roll filed by the Commissioners be and the same is hereby confirmed and approved as an additional assessment, and the lien against each subdivision, parcel, lot or tract of land within said drainage district for the cost of said improvement is hereby declared and established as follows, to-wit:

(Plaintiff's Exhibit No. 17 continued)

MIRROR OR SPROLL'S LAKE AREA

Parcel No.	Accruing to	Acrea	Rate	Amount	Preliminary Assessment Rate \$0.75	Total	Damages
1.	Lot 2, Sec. 4, T. 61 N., R. 1 E.B.M.....	38.82	\$47.5016	\$1,844.01	\$ 29.11	\$ 1,873.12	None
2.	Lot 3, Sec. 4, T. 61 N., R. 1 E.B.M.....	39.64	47.5016	1,882.96	29.73	1,912.69	"
3.	N. 60 Rods Lot 4, Sec. 4, T. 61 N., R. 1 E.B.M.....	28.73	47.5016	1,364.72	21.55	1,386.27	"
4.	S. 20 rods Lot 4, Sec. 4, T. 61 N., R. 1. E.B.M.....	9.64	47.5016	457.92	7.23	465.15	"
5.	N. 20 feet Lot 5, Sec. 4, T. 61 N., R. 1. E.B.M.....	.83	47.5016	39.42	.62	40.04	"
6.	Lot 5, Sec. 4, T. 61 N., R. 1 E.B.M. less N. 20 feet	38.95	47.5016	1,850.19	29.21	1,879.40	"
7.	Lot 1, Sec. 9, T. 61 N., R. 1 E.B.M.....	7.65	47.5016	363.38	5.74	369.12	"
8.	Lot 2, Sec. 9, T. 61 N., R. 1 E.B.M.....	10.36	47.5016	492.12	7.77	499.89	"
9.	Lot 3, Sec. 9, T. 61 N., R. 1 E.B.M.....	57.32	47.5016	2,722.79	42.99	2,765.78	"

(Plaintiff's Exhibit No. 17 continued)

Parcel No.	Accruing to	Acres	Rate	Amount	Preliminary Assessment Rate \$0.75	Total	Damages
10.	Lot 1, Sec. 8, T. 61 N., R. 1 E.B.M.....	48.84	\$47.5016	\$2,319.98	\$36.63	\$2,356.61	None
11.	Lot 2, Sec. 8, T. 61 N., R. 1 E.B.M.....	66.39	47.5016	3,153.63	49.79	3,203.42	"
12.	Lot 3, Sec. 8, T. 61 N., R. 1 E.B.M.....	1.65	47.5016	78.38	1.25	79.63	"
13.	Lot 4, Sec. 5, T. 61 N., R. 1 E.B.M.....	23.39	47.5016	1,111.06	17.54	1,128.60	"
14.	Lot 3, Sec. 5, T. 61 N., R. 1 E.B.M.....	55.02	47.5016	2,613.54	41.26	2,654.80	"
15.	Lot 7, Sec. 6, T. 61 N., R. 1 E.B.M.....	5.81	47.5016	275.98	4.36	280.34	"
16.	Lot 1, Sec. 6, T. 61 N., R. 1 E.B.M.....	27.14	47.5016	1,289.19	20.36	1,309.55	"
17.	Lot 6, Sec. 6, T. 61 N., R. 1 E.B.M.....	23.55	47.5016	1,118.66	17.66	1,136.32	"
18.	Lot 1, Sec. 5, T. 61 N., R. 1 E.B.M.....	262.29	47.5016	12,459.19	196.72	12,655.91	"

(Plaintiff's Exhibit No. 17 continued)

Parcel No.	Accruing to	Acres	Rate	Amount	Preliminary Assessment Rate \$0.75	Total	Damages
19.	Lot 2, Sec. 5, T. 61 N., R. 1 E.B.M.....	103.11	\$47.5016	\$4,897.89	\$ 77.33	\$ 4,975.22	None
20.	Lot 1, Sec. 32, T. 62 N., R. 1 E.B.M.....	7.70	47.5016	413.26	6.53	419.79	"
21.	Lot 2, Sec. 32 T. 62 N., R. 1 E.B.M.....	13.25	47.5016	629.41	9.93	639.34	"
22.	Lot 3, Sec. 32, T. 62 N., R. 1 E.B.M.....	13.56	47.5016	644.12	10.18	654.30	"
23.	Lot 4, Sec. 32, T. 62 N., R. 1 E.B.M.....	49.19	47.5016	2,336.60	36.89	2,373.49	"
24.	Lot 5, Sec. 32, T. 62 N., R. 1 E.B.M.....	24.70	47.5016	1,173.29	18.52	1,191.81	"
25.	Lot 6, Sec. 32, T. 62 N., R. 1, E.B.M.....	18.51	47.5016	879.25	13.88	893.13	"
26.	Lot 2, Sec. 33, T. 62 N., R. 1, E.B.M.....	29.50	47.5016	1,401.30	22.12	1,423.42	"
27.	Lot 1, Sec. 33, T. 62 N., R. 1 E.B.M.....	16.51	47.5016	784.25	12.38	796.63	"
		1023.05		\$48,596.49	\$767.28	\$49,363.77	

(Plaintiff's Exhibit No. 17 continued)

FRY'S LAKE AREA

Parcel No.	Accruing to	Acres	Rate	Amount	Preliminary Assessment Rate \$0.75	Total	Damages
1.	Lot 3, Sec. 29 T. 62 N., R. 1 E.B.M. except E. 400 ft.....	18.99	\$47.5016	\$ 902.06	\$14.24	\$ 916.50	None
2.	Lot 4, Sec. 29, T. 62 N., R. 1, E.B.M.....	15.42	47.5016	732.47	11.57	744.04	"
3.	Lot 5, Sec. 29, T. 62 N., R. 1 E.B.M.....	34.99	47.5016	1,662.08	26.24	1,688.32	"
4.	Lot 6, Sec. 29, T. 62 N., R. 1 E.B.M.....	31.68	47.5016	1,504.85	23.76	1,528.61	"
5.	Lot 7, Sec. 29, T. 62 N., R. 1 E.B.M.....	3.05	47.5016	144.88	2.29	147.17	"
6.	Strip land in Lot 3, Sec. 29, T. 62 N., R. 1 E.B.M. 14 Ft. wide on W. end, 16 ft. wide on E. end, bordering the N. shore Fry's Lake distance of 400.24 ft., measured from S.E. corner Lot 3.....	13.87	47.5016	658.85	10.40	669.25	"
7.	Lot 5, Sec. 30, T. 62 N., R. 1 E.B.M.....	11.20	47.5016	532.02	8.40	540.42	[439] "
8.	Lot 6, Sec. 30, T. 62 N., R. 1, E.B.M.....	0.05	47.5016	2.37	0.04	2.41	"

(Plaintiff's Exhibit No. 17 continued)

Parcel No.	Accruing to	Acres	Rate	Amount	Preliminary Assessment Rate \$0.75	Total	Damages
9.	NW $\frac{1}{4}$ -SE $\frac{1}{4}$, Sec. 28 T. 62 N., R. 1 E.B.M.....	19.30	\$47.5016	\$ 916.78	\$ 14.48	\$ 931.26	None
10.	Lot 8, Sec. 28, T. 62 N., R. 1, E.B.M.....	43.40	47.5016	2,061.57	32.55	2,094.12	"
11.	Lot 9, Sec. 28, T. 62 N., R. 1 E.B.M.....	4.50	47.5016	213.75	3.38	217.13	"
12.	Lot 9, Sec. 29, T. 62 N., R. 1 E.B.M.....	43.42	47.5016	2,062.52	32.56	2,095.08	"
13.	Lot 8, Sec. 29, T. 62 N., R. 1 E.B.M.....	47.28	47.5016	2,245.88	35.46	2,281.34	"
14.	Lot 3, Sec. 28, T. 62 N., R. 1 E.B.M.....	37.14	47.5016	1,764.21	27.85	1,792.06	"
15.	Lot 4, Sec. 28, T. 62 N., R. 1 E.B.M.....	14.54	47.5016	690.68	10.90	701.58	"
16.	Lot 1, Sec. 29, T. 62 N., R. 1, E.B.M.....	45.60	47.5016	2,166.07	34.20	2,200.27	"
17.	Lot 2, Sec. 29, T. 62 N., R. 1 E.B.M.....	48.49	47.5016	2,303.35	36.37	2,339.72	"
		432.92		\$20,564.39	\$324.69	\$20,889.08	

(Plaintiff's Exhibit No. 17 continued)

It is Further Ordered, Adjudged and Decreed That the benefits accruing to each of the tracts of land affected by said assessment is in excess of \$150.00 per acre as to each and every acre therein, the benefits being uniform as to each and every acre in said reclaimed area and the tracts affected by this assessment.

It Is Further Ordered, Adjudged and Decreed That no damages be awarded in favor of any of the owners of any of the tracts affected by said assessment.

It Is Further Ordered, Adjudged and Decreed That said Drainage District No. 1 of the County of Boundary, State of Idaho, have and said District is hereby granted a perpetual easement, while the said Drainage District shall be maintained, to go upon the land included in said District and to construct and maintain a drainage ditch and for the depositing of material removed in the construction of such ditch and for the maintenance and repair of said drainage ditch, the said easement for right of way being particularly described as follows, to-wit: [440]

Description of Main Lateral No. 1 and Lateral No. 3 across Mirror or Sproll's Lake:

A strip of land 50 feet in width, 10 feet on the left or southerly side and 40 feet on the right or northerly side of the center line of the Main Lateral No. 1 of Drainage District No. 1, Boundary County, Idaho, as constructed through and across the lands

(Plaintiff's Exhibit No. 17 continued)

within the Government meandered Mirror or Sproll's Lake. The center line of said Main Lateral being more particularly described as follows: Beginning at the section corner on the 13th Standard Parallel North, which corner is common to Sections 31 and 32 T. 62 N., R. 1 E. B. M.; thence S. $53^{\circ} 10'$ E. to point No. 1; thence S. $50^{\circ} 30'$ W. 935.8 feet to point No. 2; thence $6^{\circ} 00'$ E. 725 feet to point No. 3; thence S. $62^{\circ} 30'$ E. 2334 feet to point No. 4 the end of said lateral No. 1 and the beginning of Lateral No. 3; thence, continuing along the center line of said Lateral No. 3, with a total width as of Lateral No. 1 and with 10 feet in width on the left or southerly side, and 40 feet on the right or northerly side of said center line, S. $49^{\circ} 30'$ E. 1872 feet to point No. 5; thence S. 78° E. 1331.8 feet to point No. 6; thence N $82^{\circ} 30'$ E. 675.2 feet to point No. 7; thence N. $4^{\circ} 30'$ E. 1796 feet to point No. 8; thence N. $60^{\circ} 30'$ E. 1525 feet to a point on the Government Meander of said Mirror or Sproll's Lake on the East side thereof, which point is S. 7° W. 220 feet from the Government Meander corner which is S. 4° W. 1644 feet from the Government Meander corner to fraction Section 4 T. 61 N., R. 1 E. B. M., and fractional Section 33, T. 62 N., R. 1 E. B. M.

The total area within the 50 foot strip as above described is 12.73 acres more or less, 5.1 acres of which being the acreage within the area of Lateral No. 1 and 7.63 acres being the acreage within the area of Lateral No. 3.

(Plaintiff's Exhibit No. 17 continued)

Description of Main Drainage Canal, through the land within the Government meandered Fry's Lake;

A strip of land 50 feet in width, 25 feet in width on each side of the center line of the Main Drainage Canal of Drainage District No. 1, Boundary County, Idaho, which is more particularly described as follows:

Beginning at a point where the Main Drainage Canal of Drainage District No. 1, intersects the meander line of Fry Lake, which point is approximately 800 feet west and 260 feet south of the NE corner of Section 30, Twp. 62 N., R. 1 E. B. M.; thence, through and across the lands within the meandered Fry Lake, southeasterly 1050 feet to a point on the easterly line of said Sec. 30, extended across the said Lake, said point being 827 feet south of N.E. corner of said Section 30; thence southeasterly 4249 feet to a point on the east line, extended, of Lot 8, Sec. 29, Tw. 62 N., R. 1 E. B. M., which point is 300 feet north of the east and west center line of said Section 29; thence south along the said east line extended of said Lot 8 to an intersection with the Government Meander line, which is the N.E. corner of said Lot 8. The area within said 50 foot strip being 7.74 acres, more or less.

It is further ordered, adjudged and decreed that the Commissioners of Drainage District No.

(Plaintiff's Exhibit No. 17 continued)

1 of Boundary County, Idaho, within a reasonable time, clean out, deepen and improve the present drainage ditch so as to suitably and effectively drain the land of objectors, to-wit:

MIRROR OR SPROLL'S LAKE AREA

Parcel No.

- | | | | |
|----|-----------------------------|--------|--|
| 11 | acruing to Lot 2 | Sec. 8 | Twp. 61 N., R. 1 E. |
| 12 | acruing to Lot 3 | Sec. 8 | Twp. 61 N., R. 1 E. |
| 13 | acruing to Lot 4 | Sec. 5 | Twp. 61 N., R. 1 E. |
| 14 | acruing to Lot 3 | Sec. 5 | Twp. 61 N., R. 1 E. |
| 6 | acruing to Lot 5 | Sec. 4 | Twp. 61 N., R. 1 E.
Less North 20 ft. |
| 7 | acruing to Lot 1 | Sec. 9 | Twp. 61 N., R. 1 E. |
| 8 | acruing to Lot 2 | Sec. 9 | Twp. 61 N., R. 1 E. |
| 9 | acruing to Lot 3 | Sec. 9 | Twp. 61 N., R. 1 E. |
| 3 | acruing to N. 60 Rods Lot 4 | Sec. 4 | Twp. 61 N., R. 1 E. |
| 4 | acruing to S. 20 Rods Lot 5 | Sec. 4 | Twp. 61 N., R. 1 E. |
| 5 | acruing to N. 20 ft. Lot 5 | Sec. 4 | Twp. 61 N., R. 1 E. |
| 10 | acruing to | Lot 1 | Sec. 8 Twp. 61 N., R. 1 E. |

[441]

It Is Further Ordered, Adjudged and Decreed That said assessment as confirmed be extended against each tract of land as described in the detailed description set forth in Finding of Fact No. X filed herein, and in the Assessment Roll set forth in Finding of Fact No. XIV by the taxing officers of Boundary County, Idaho.

Done in Chambers this 20th day of August, 1924.

HERMAN H. TAYLOR,

District Judge.

(Plaintiff's Exhibit No. 17 continued)

State of Idaho,

County of Boundary—ss.

Filed Aug. 20, 1924, at 1:45 o'clock, P. M., Book
5, Judgments, page 549.

DOLLIE BRUCE,

Clerk of District Court,

By H. M. Macnamara,

Deputy. [442]

CLYDE F. LITTLEFIELD,

being called as a witness on behalf of the plaintiff,
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Whitla:

Q. Where do you reside?

A. Bonners Ferry.

Q. How long have you resided there?

A. Since the spring of 1924.

Q. What is your first name Mr. Littlefield?

A. Clyde F.

Q. What has been your occupation up there
in Bonners Ferry?

A. In recent years, operating a Dragline. [162]

Q. How long have you been a dragline operator?

A. Since 1929.

Q. Are you acquainted with Drainage District
number 1, in Boundary County. A. Yes sir.

Q. How long have you been acquainted with
that Drainage district?

(Testimony of Clyde F. Littlefield.)

A. I don't remember exactly when I first worked there but I think it was in 1929 or 1930.

Q. That is your first acquaintance with the District?

A. I knew that the District was there before then.

Q. Yes, but in 1929 and 1930 who were you working for? A. For the District.

Q. What were you doing?

A. At that time I was oiling machines.

Q. Who was operating the Dragline?

A. Blankenship.

Q. How many years have you worked in that drainage district since?

A. Three or four, at different times of the year.

Q. Are you acquainted with the Mirror Lake section. A. Yes sir.

Q. Did you work there in 1938, 1939 or 1940?

A. I worked there in 40 and 41 and either 38 or 39.

Q. When you worked there in 1938 or 39 tell us what you were doing? [163]

A. I think I worked from the Booster pump through Mirror Lake and also in——

Q. ——Just come to the map and point out where the Booster pump is situated and the lines of that drainage district where you worked. This is Ralph Richmond's; this is Jake Booher land, this is the S & I Railroad crosses here in the North-east corner of section 32. Where is the Booster pump? A. Somewhere in here (indicating).

(Testimony of Clyde F. Littlefield.)

Q. Between sections 4 and 5? A. Yes sir.

Q. Where from there did you work, when you worked there in the last few years?

A. All the way,—in the last three years, up past Bauman's.

Q. That is in section 33?

A. Yes, I have worked past there, up past the highway.

Q. The highway runs between 5 and 6 and 32 and 33? A. Yes sir.

Q. In those years what did you find in the ditches as you went up there?

A. I found that they were filled up more or less.

Q. What was the condition of the laterals as to whether they had growth in them, outside of the main ditch?

A. They always had growth in them.

Q. What did that consist of?

A. Weeds, cat-tails and grass. [164]

Q. Did you find any obstructions in them?

A. Yes, they had these slides.

Q. And where were they?

A. About 150 feet from this corner.

Q. The land marked in pink or red, the South-east corner of that?

A. Yes sir, and there was four of them along here, fifty to a hundred and fifty feet apart.

Q. As you went through there did you find whether those slides stopped the drainage of the water? A. They stopped the drainage, yes sir.

(Testimony of Clyde F. Littlefield.)

Q. How much difference was there in the elevation of the water below the first slide and above it,—strike that,—I will ask this, Mr. Littlefield, how much difference was there between the elevation of the water below the last slide and above the first one?

A. From a foot and a half to two feet.

Q. What did you do with those slides?

A. Took them out.

Q. Is there another ditch near the Great Northern track as it goes east, which goes under the track?

A. Yes sir.

Q. Did you do anything to clean that ditch?

A. Yes sir, last year.

Q. Prior to 1940?

A. Well, several years ago I did. [165]

Q. When was it?

A. Well, I was in there twice before last year.

Q. What was its condition when you cleaned it in 1940?

A. It was full of weeds and silt.

Q. Would water drain through it?

A. It would drain through it some, but it would back it up.

Q. Is there any lateral ditches to the south from this ditch?

A. Yes sir.

Q. How many of those are there?

A. I think there are four dragline laterals.

Q. How deep are those dragline laterals?

(Testimony of Clyde F. Littlefield.)

A. About two and a half to four feet.

Q. How wide are they across the top?

A. About ten or twelve feet.

Q. What was their condition as to whether they were cleaned up?

A. There are places they had stood up and other places the dirt and silt was in, the dirt had slid down and there were weeds and cat-tails in them.

Q. Growing in them you mean?

A. Yes sir, each time I cleaned them.

Q. Were those laterals in that condition when you went there? A. Yes.

Q. And with the laterals in that condition would water flow through or back up? [166]

A. It would back up. It would not flow through readily.

Q. Would it make the land wet or not?

A. It would raise the water table on the land and make it wet.

Q. As you went north on this ditch through section 33 does it get somewhat higher in elevation?

A. Yes sir.

Q. What was the condition after you got up there, were those ditches caved in?

A. They are not caved in so much, but had a lot of weeds.

Q. If the water drained down from the north what effect would it have in backing it up when it hit these slides?

(Testimony of Clyde F. Littlefield.)

A. It would back it up high enough to run over the slides.

Q. Is there any other lateral ditch that runs toward the Great Northern track and under it?

A. Yes sir.

Q. And what was their condition,—the laterals you have referred to as dragline laterals.

A. Two of them, one from the main ditch.

Q. Their condition about the same.

A. Yes.

Q. Is there any way to clean those other than by dragline or some such instrument?

A. I don't know of any.

Q. That is the customary way of cleaning them?

[167]

A. Yes sir.

Q. In 1940 were those slides in at the Southeast corner of that portion marked in pink or red, which is marked Simon McDonald?

A. Yes, they were there.

Q. In 1941 did you go back there.

A. Yes sir.

Q. Did you find slides there in 1941?

A. Yes sir.

Q. Blocking the stream? A. Yes sir.

Q. About the same as when you were there before? A. Practically the same.

Q. In regard to the lateral ditches, especially the ones running south from that main lateral, can

(Testimony of Glyde F. Littlefield.)

you say what the condition of those were at that time?

A. They were a good deal the same as they were when I was there before. Some of them were standing up better and some had slides in them.

Q. As this water drains down to the booster pump, what is there to catch it where the pump is?

A. There is a sump there.

Q. A sump to gather the water? A. Yes.

Q. How far does that pump lift it, approximately to get [168] to the ditch that runs to the river? A. I imagine nine or ten feet.

Q. Mr. Littlefield, in the operation of a drag-line what is the fact as to whether or not it is commonly found in this drainage district that there are sections that slough off and fill the ditches?

A. Yes sir.

Q. What is the proper method of stopping that?

A. They clean them out with the dragline and some of them slough back again but they have used sheet piling to keep that sloughed off part from coming in.

Q. Tell the Court what sheet piling is and how you put it in?

A. Well, they use plank and drive them into the ground deep enough to hold the bottom and put timber or walling across.

Q. Is that the timber that runs along lengthwise? A. Yes sir.

Q. And then they are held apart?

(Testimony of Clyde F. Littlefield.)

A. Yes sir.

Q. If they do that do they have any trouble after that?

A. They have to keep them cleaned out with a clam.

Q. Did you find any of this class of work done on any of the other people's land there?

A. Yes sir.

Q. Where did you find it? [169]

A. Near the outlet and also at Mr. Bauman's.

Q. How much of it is on Mr. Bauman's land?

A. A couple of hundred feet.

Q. How much of that is down by the outlet?

A. Seven or eight hundred feet.

Q. In your opinion how many feet of that sheet piling would it take where the slides are in the main channel so that the water would drain through it freely? A. Three or four hundred feet.

Q. In regard to the ditches what is the fact as to whether or not in this drainage district in the Kootenia bottoms is it customarily necessary to clean out these ditches so that the water will run through them freely?

A. Some do and some don't.

Q. What happens to the ones that don't, or are not cleaned.

A. Some of them have better drainage than others. Most of them are cleaned every year or two years.

(Testimony of Clyde F. Littlefield.)

Q. This ditch that you referred to is how long approximately. A. The main lateral.

Q. Yes. A. Five or six miles.

Q. And is the fall heavy or slight?

A. I don't think there is any place where the water runs rapidly.

Q. In water of that type what is the fact as to it filling up with vegetation, growing in the ditches?

[170]

A. Yes sir, I think it does.

Q. This material that gets into the ditch, where does it come from, generally?

A. Some sloughs from the bank, some washes in and some grows in the ditch.

Q. These slides, did you do anything to get away from these slides?

A. We cleaned them out and one, we cut around.

Q. You cut away from it?

A. Yes sir, we dug on the north side of the slide. We made a new ditch.

Q. What is the fact whether or not the ditch stood up and the water drained through?

A. It was the last time I looked at it.

Q. With regard to the ground does it dry out readily if it is exposed to the summer sun with the water off? A. Some of it.

Q. With regard to the land with water on it, does it ever get solid as long as it is wet, or has water on it? A. No sir, it doesn't.

(Testimony of Clyde F. Littlefield.)

Q. What would you say as to whether or not it would be feasible and practical to either put sheet piling after it is cleaned out, to take care of those sloughing off places?

A. Yes sir, I would say it is feasible. It has worked other places and it could work there.

Q. You were familiar with that land in 1938 and 1939 [171] A. Yes sir.

Q. What is the progress made on that land, as to how it was back in 1938 and 1939, for the purpose of being cropped?

A. A lot more of it farmed, quite a lot more plowed and farmed.

Q. Did you walk across it in 1938 and 1939?

A. Yes sir.

Q. What was the condition of it where you walked over it? A. What way do you mean.

Q. Did you have any experience in walking across it relative to sinking down or anything of that kind, to show the difference in it then and now. A. Yes sir, I did.

Q. Tell the Court what was the condition.

A. There are parts now that you can walk on, parts that you can walk on now that was all cat-tails and swamps.

Q. What was the condition of the land where these cat-tails were as to being soft?

A. It was soft where the cat-tails were.

(Testimony of Clyde F. Littlefield.)

Q. Now, what is the fact as to whether a person with ordinary shoes on can walk across that land now? A. Not all of it.

Q. How much of it would you say?

A. About half of it. [172]

Q. Did you notice whether there was any crop grown on the portion cultivated this present year?

A. Yes sir.

Q. What was that crop? A. Mostly oats.

Q. What could you say as to the character of the crop? A. What do you mean.

Q. Whether it was light or heavy or otherwise?

Judge Hunt: Objected to as there is no showing here that this engineer is qualified to testify as to crops.

The Court: Sustained.

Q. Have you seen crops in that valley this year and for years past? A. Yes sir.

Q. Can you tell the difference between a light crop and a heavy crop? A. Yes sir.

Q. In that district? A. Yes sir.

Q. What was this crop a light or heavy one?

Judge Hunt: We object again for the same reason as stated.

The Court: Sustained.

Q. What was the condition of its height, was it heavy or not? [173]

A. I saw it in the shock.

Q. How close were they together.

A. I would say fairly thick.

(Testimony of Clyde F. Littlefield.)

Q. About this time,—strike that—Who were you working for when you were there in 1940, was it Mr. Woldson? A. Yes sir.

Q. He hired you and paid you for your work there?

A. I think I worked for the District in 1940 too.

Q. You worked for the District?

A. I think so, but I am not sure about that.

Q. How long did you work for the District?

A. I don't remember exactly, I believe in 1940 I cleaned out the main ditch from the Spokane International railroad to the corner where it goes North.

Judge Hunt: Was that for the district?

A. For the district.

Q. Did you open up any laterals for the District at that time? A. No sir.

Q. You were acting as operator of the dragline in working for Mr. Woldson? A. Yes sir.

Q. With regard to the laterals outside of the main lateral what did you do in regard to those?

A. Cleaned all of them,—practically all of them.

[174]

Q. Have you been working on the dragline this fall? A. Yes sir.

Mr. Whitla: That is all.

Cross Examination

By Judge Hunt.

Q. Mr. Littlefield, from what source does this water come from that is in Mirror Lake?

(Testimony of Clyde F. Littlefield.)

A. From the whole upper end of the District.

Q. From what natural source does it come?

A. Springs.

Q. Isn't it a fact also Mr. Littlefield, that the water from Mud Lake goes to Mirror Lake?

A. Yes sir.

Q. Circulates through the main ditches and then travels on down? A. Yes sir.

Q. You cleaned out all the slides in 1941?

A. Yes sir.

Q. Did you clean out the slides in 1939?

A. Yes, I think I did.

Q. In 1938?

A. I wasn't in there both years, I was there one year and I don't remember which it was.

Q. These slides were new slides each year?

A. Some old slides.

Q. In the same location but new dirt. [175]

A. Yes sir.

Q. Each year the slides were in the same spot.

A. Yes sir.

Q. Caused by springs. A. Yes sir.

Q. Is there any practical way to block up those springs so that they won't slide?

A. Not that I know of.

Q. You never heard of any? A. No sir.

Q. State whether there is considerable drainage through those springs from other land adjacent to the district. A. I wouldn't know.

(Testimony of Clyde F. Littlefield.)

Q. Well, are there any other creeks to carry off that water? A. No sir.

Q. Is it necessary that this sump you spoke of be as deep as it is? A. I think it is.

Q. The pump has to pump that water up nine or ten feet and give it a kick into the ditch?

A. Over a dam and into a ditch.

Q. How much lower is this Mirror Lake District that at the edge of the dike?

A. I wouldn't know.

Q. It is much lower. A. It is lower. [176]

Q. Are the river banks at a greater elevation than the Mirror Lake Area? A. Yes sir.

Q. This main ditch through Sol Bauman's,—that is the main ditch?

A. I think they call it the main ditch.

Q. That is owned by the District?

A. Yes sir.

Q. It is not Bauman's ditch?

A. No I don't think it is.

Q. This year at one particularly bad slide area you took the dragline and went around it to avoid this spot where it has been sloughing in each year.

A. We went around the edge of it.

Q. It was more practical to make a new ditch than clean out the old one?

A. In that case it was.

Q. Was that your opinion? A. Yes sir.

Q. Do those ditches become soft after being

(Testimony of Clyde F. Littlefield.)

worked on year after year and do they have a tendency to slough off?

A. In places the heavy machines make them slough off.

Q. It is preferable in places to dig new ditches rather than dig out the old ones?

A. Yes, I think it would be. [177]

Q. I will ask you if the sheet piling in those spring areas, if it would not be impossible to hold it in there? A. I never heard of it jumping up.

Q. Never heard of it being pushed out.

A. I guess it could get weight in there to push it out.

Q. State whether in drainage district number 1, there have been dry years and wet years since 1938,—that is, since 1938 have they been drier or wetter than usual? A. I think this year is wetter.

Q. Yes, this is a wet year. A. Yes.

Q. Last year, what about that?

A. It was considered a dry year.

Q. And 1939, how about 1939?

A. I think it was considered a dry year also.

Q. In your opinion progress has been made in reclaiming that land? A. Yes sir.

Q. Since 1938 it has been getting better from a reclamation point of view?

A. They farm more of it as they go along.

Q. They farm more than they used to in previous years. A. That is right.

(Testimony of Clyde F. Littlefield.)

Q. They are catching up on it and overcoming the wet area? A. Yes sir. [178]

Q. More land being put in cultivation?

A. Yes sir.

Q. Is there any possible way to avoid these slides year by year, in those ditches?

A. As I said, the only way is to shut them off by cribbing.

Q. To crib the entire ditch?

A. Well, some of the slides will quit sliding if they are not too big.

Q. If you crib the entire ditch they would not slide. A. No, I don't think it would.

Q. Most of those slides are caused by springs?

A. Yes sir, in the smaller ditches.

Judge Hunt: I believe that is all.

Redirect Examination

By Mr. Whitla.

Q. You say slides in the smaller ditches are caused by springs? A. Yes sir.

Q. In the main ditch is that caused by soggy ground? A. Soggy ground and springs.

Q. What time of the year is the best time to clean those ditches? In the Summer when it is warm and dry or in the fall when it is wet and cold?

A. I think in July it is easier to get around.

Q. And what about the banks whether they stand up better in July and August or in the fall and winter. [179]

(Testimony of Clyde F. Littlefield.)

A. I think the sun kind of bakes the mud and holds it better.

Q. Then you think it is better to do it in July or August or in the Summer rather than the winter when it is cold and wet.

A. Yes sir.

Q. You said something about heavy machines causing the ditches to slough where they had sloughed before.

A. Yes.

Q. What is the reason for that?

A. Vibration.

Q. Do you use any mats.

A. Yes sir, under the machine.

Q. What do you use.

A. Kind of pontoons threaded on a cable, made out of logs.

Q. This area next to the Great Northern railroad, what is the fact as to whether there is a ditch to catch the water before it gets to the main ditch?

A. Down there.

Q. Yes in that vicinity.

A. Yes sir, there is.

Q. Where does that empty into the main ditch from the booster pump?

A. About a mile from the booster pump.

Q. What does that do if it is kept open relative to the water draining down from the hill?

A. It would be pretty wet if that ditch wasn't there. [180]

Q. Is that what it is for?

(Testimony of Clyde F. Littlefield.)

A. Yes sir.

Q. Does that ditch extend under the great Northern track to catch that water?

A. Off the hills, you mean.

Q. Yes. A. Yes sir.

Mr. Whitla: That's all.

Judge Hunt: No further questions.

JAMES S. MORTELBERG,

Being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Whitla.

Q. Give the Reporter your name?

A. James S. Morkelberg.

Q. Where do you reside? A. Moravia.

Q. How far from the land of Mr. Woldson's referred to as being the Mirror Lake Land in drainage district number one, do you live?

A. Just a highway between my land and his.

Q. What have you done relative to working for Mr. Woldson on this land. [181]

A. I have worked there for three years.

Q. What work have you been doing.

A. Putting in hand ditches.

Q. Something has been said about dragline ditches upon this land and between these dragline

(Testimony of James S. Morkelberg.)

ditches has Mr. Woldson put in some other system?

A. Yes sir, by digging these hand ditches.

Q. Have you observed the condition of this district during the past three years? A. Yes sir.

Q. In regard to this main lateral are you familiar with that where it comes along the south end of Simon McDonald's land? A. Yes sir.

Q. What have you observed in that vicinity?

A. I have observed two bad slides.

Q. How long have they been there?

A. They have been cleaned out several times.

Q. In regard to the depth of the water between them,—strike that,—in regard to the depth of the water above and below the slides, how much does it back the water up in the ditch?

A. You mean as the ditch goes down.

Q. Yes, that is, how much higher is the water above the slides than below the slides?

A. Eighteen inches or more. [182]

Q. What does that do to Mr. Woldson's land?

A. It makes it wet.

Q. The water,—does it stand close to the top?

A. Raises up.

Q. What effect does it have on the laterals.

A. It makes the water back up in the laterals and the main ditch.

Q. About how many of these hand ditches has Mr. Woldson caused to be built or dug there?

A. A good many.

(Testimony of James S. Morkelberg.)

Q. With regard to the lateral ditches these dragline ditches, the one which extends from Mr. Woldson's place, excepting when Mr. Woldson cleaned these, have they been cleaned out in 1940?

A. Yes sir, in 1940.

Q. By whom?

A. I think Mr. Littlefield worked there in 1940.

Q. When these obstructions are taken out what becomes of the water in the main ditch or the water back in the lateral ditches on Mr. Woldson's land?

A. When they are cleaned out.

Q. Yes. A. It lowers the water.

Q. What effect does that have on the land whether one can go on it to cultivate?

A. It makes it drier in a very short time. [183]

Q. In the last couple of years what have you noticed as to whether it is remaining as wet as it was before, or drier?

A. There is a big change in it in the last two years.

Q. In what way?

A. Some ditches dug last fall are completely dry, and lots of land drier.

Q. How deep are those dragline ditches?

A. They vary. Some places they sloughed in much worse than others.

Q. Now, with regard to the sloughing in, is there anything growing in these ditches where they have sloughed off?

(Testimony of James S. Morkelberg.)

A. Cat-tails, beggar ticks, and spanish needles.

Q. What effect does that have on the water in the ditches. A. It holds the water back.

Q. What is the fact as to whether or not there is always more or less silt getting in the ditches?

A. It all goes to fill in the ditches.

Q. And if there are any obstructions in the ditches what does that do in reference to silt collecting in the ditches?

A. More collects in the ditches.

Q. In the last year what has been done on that land relative to cultivating it?

A. He has had quite a bit in crops. [184]

Q. How much? A. Fifty per cent or better.

Q. That much in crop this year?

A. Yes sir.

Q. What is the character of this soil when it is drained? A. What do you mean.

Q. What is the character of the soil, whether it produces heavy or otherwise.

A. It produces a good crop.

Q. You are farming in that vicinity?

A. No sir, I am not.

Q. Prior to 1939 and 1940 any of this land in cultivation or even plowed?

A. Might have been able to plow it but couldn't get on it to plow it.

Q. What is the condition of it this year, as to walking on it?

A. Lot of places the ground is cracked open.

(Testimony of James S. Morkelberg.)

Q. What does the draining of the water in the summer do relative its cracking.

A. The water runs in these cracks into the laterals and it dries the land.

Q. If the water is held back will it crack open?

A. No sir, and it doesn't crack where these slides are, it won't crack. [185]

Q. Is there another lateral ditch that runs around the foot of the hill, about the edge of the land?

A. That is what they call the rim ditch.

Q. What water does it collect?

A. It collects water from the mountains there.

Q. What has been that rim ditch's condition up until these last two years, as to being cleaned out?

A. It has been filled up with slides.

Q. Has it been cleaned out recently?

A. Last spring I think.

Q. What effect does that have on the water coming on the lower section of the land?

A. It helps a whole lot to cut off the water from the ditch below that.

Q. Do you know anything about a part of the district being fixed up by plank used for cribbing?

A. I have seen a lot of it but didn't see anything down where I am at. I haven't done any.

Q. You are not familiar with any in this area?

A. No sir.

Q. Have you had any talk with Mr. Bauman

(Testimony of James S. Morkelberg.)

about the effect that it would have on his land if the water was taken off Mr. Woldson's land?

Judge Hunt: We have no objection to his answering that yes or no.

The Court: He may answer this question [186] yes or no.

Q. Did you have any conversation with Bauman in regard to that matter? A. Yes sir.

Q. State when and where it was.

A. It was close to these two bad slides?

Q. What year was that.

A. 1941, this year.

Q. Was there anybody else who took part in the conversation besides you and Mr. Bauman?

A. No sir.

Q. What did Mr. Bauman say?

A. He said that by lowering this main ditch it would make it too dry in his part of the country.

Q. Did he say what the effect would be on any other part of the District by taking in other water?

Judge Hunt: Objected to as leading.

The Court: Sustained.

Q. Did he make any statement as to what effect it would have by taking in water at other parts of the District?

Judge Hunt: We make the same objection.

The Court: Sustained.

Q. Did you have any conversation with reference to the effect of water taken out of any other part of the District? [187]

(Testimony of James S. Morkelberg.)

Judge Hunt: We object to this on the same grounds. Counsel insists on asking this question.

The Court: Sustained.

Mr. Whitla: You may examine, that's all.

Cross Examination

By Judge Hunt.

Q. From what source did the water come to the land in the old Mirror Lake area?

A. From springs.

Q. Do these springs come out over a large area in the south end of the District?

A. Here and there, mostly along the edge.

Q. You say the rim ditch was cleaned out this last spring? A. Yes sir.

Q. That was cleaned out by employees of the drainage district, district officials, not by employees of any individual, or by any individual, but they were employees of the District?

A. I don't know.

Q. On direct examination you stated that the rim ditch was cleaned out last spring. Do you know who cleaned it out?

A. I think it was last spring.

Q. State whether or not the rim ditch was cleaned out by employees of the District,—the drainage district?

Mr. Whitla: If you know. [188]

A. I don't know who they were employed by, the District or Mr. Woldson.

(Testimony of James S. Morkelberg.)

Q. You didn't clean it out? A. No sir.

Q. How many other men were employed by Mr. Woldson last spring?

A. No one but myself and the dragline crew.

Q. Did the dragline crew clean out this rim ditch. A. Up as far as the bridge.

Q. The men that Mr. Woldson hired, did they clean out that ditch? A. Yes sir.

Q. You are sure of that?

A. It was cleaned up to that bridge.

Q. On the south of that land.

A. Yes, from the trestle to the bridge.

Q. Who cleaned it out?

A. I think it was Ted Lazier.

Q. Who was he employed by?

A. I don't know whether it was the District or Mr. Woldson.

Q. You said you were the only one employed by Mr. Woldson? A. Yes sir.

Q. And you did not do it? A. No sir.

Q. How far apart were these laterals on the property of [189] Mr. Woldson?

A. That I built.

Q. Yes.

A. I would say a hundred and fifty feet.

Q. Tell me, was 1939 a dry or a wet year in that section of the country?

A. That was a dry year.

Q. How about 1940?

(Testimony of James S. Morkelberg.)

A. That was a dry year too.

Q. You think that progress is being made year by year and gradually the situation is getting better in the Mirror Lake area.

A. Yes sir.

Judge Hunt: That is all.

Mr. Whitla: That's all.

ROBERT R. NELSON,

Being called as a witness on behalf of the Plaintiff,
after being first duly sworn, testified as follows:

Direct Examination

By Mr. Whitla.

Q. Your Name is Robert Nelson.

A. Robert R. Nelson.

Q. You live in drainage district number 1 of Boundary County.

A. I have a farm there. [190]

Q. How long have you been farming there?

A. Since the spring of 1939.

Q. Where did you farm previous to that time.

A. Hartline, Washington.

Q. In 1939 when you went on this land, did you have occasion to go over this land of Mr. Woldson's south of this main lateral?

A. This land in controversy.

Q. Yes. A. In the fall of 1939.

Q. What condition did you find this land in at that time. A. Tules and water.

(Testimony of Robert R. Nelson.)

Q. What about the character of the ground,—the mud and water, what did you find?

A. I came from the south across the track and left my car down by the bridge and walked up.

Q. Did you get into the mud and water?

A. I started up there and got in these tules and fell into a hole up to my hips.

Q. What was the general character of the land?

A. There was water on top of the ground.

Q. Have you looked over that section.

A. I have the north end of that.

Q. What is its condition as to whether there is water or not?

A. There is some crop on that north end.

Q. With regard to all of this land, what could you say as [191] to whether it is drier or wetter than you saw it in 1939?

A. Drier.

Q. Has there been any work done on this land?

A. Toward draining it.

Q. Yes, and also fixing it for cropping.

A. Yes sir, some hand ditches made.

Q. Has it been farmed? A. Yes sir.

Q. How much has been farmed?

A. I would not know exactly.

Q. Just your best estimate.

A. I never paid any attention to say how much.

Q. Well, can you give about the proportion that was plowed or cropped in the last year?

A. This last year.

Q. Yes, how much is in cultivation?

(Testimony of Robert R. Nelson.)

A. I don't know.

Q. How long have you been farming?

A. I was raised on a ranch.

Q. How old are you? A. Forty-one.

Q. With regard to the crop that grew on that land, did you see the crop?

A. On the north end.

Q. What was growing there? A. Oats.

[192]

Q. State to the Court what, in your opinion, that would go to the acre when harvested?

A. Around a ton or a ton and a half.

Q. And that would be what when reduced to bushels.

Judge Hunt: Objected to as it is just a matter of calculation.

The Court: He may answer.

A. Around ninety bushels.

Q. Ninety bushels to the acre?

A. Yes sir, but we generally talk of oats by the ton.

Q. Did you notice the ditch along this land whether there was any obstructions in the ditch when you saw it at various times?

A. I never noticed the ditches in the fall of 1939, any more than they were cleaning it with the dragline at that time, close to the junction.

Q. Do you know who was running the dragline.

A. I think Mr. Farnum.

(Testimony of Robert R. Nelson.)

Q. Do you notice how much work they did and what ditches they went on? A. No sir.

Q. In regard to the main ditch, have you noticed any obstructions in it?

Judge Hunt: May we have the time fixed in this question. [193]

Q. When was it?

A. At various times this summer.

Q. Did you see obstructions there this summer?

A. Every time I was there there was a slide in the main ditch.

Q. Whereabouts in the main ditch did you see those obstructions, was it close to the corner where it turns north?

A. Yes, from the corner where it comes from Baumans.

Q. How many slides did you notice?

A. Three or four.

Q. Did the slides cause the water to back up?

A. Yes sir.

Q. How much did it cause the water to back up.

A. Well, on the corner where it goes north, about two feet of standing water.

Q. Did you notice as to whether there was work in the rim ditch or were you familiar with that?

A. No sir.

Q. Did you notice whether Mr. Woldson had been doing any work in making hand ditches?

A. Yes sir.

(Testimony of Robert R. Nelson.)

Q. Tell us when you noticed this work?

A. I noticed that man, from the fall of 1939 on, that was digging those hand ditches.

Q. Do you know who he was?

A. I know now who he is. [194]

Q. Have you had any conversation with Mr. Bauman to the effect that the draining of this water would have on his land?

A. Just talking this Summer and he said it would effect this higher land.

Judge Hunt: May we have the time and the place fixed.

The Court: Yes, fix the time and place Mr. Whitla.

Q. Fix the date and who was present.

A. I cannot establish the date.

Q. About when was it?

A. The last of May or the first of June.

Q. Where was it?

A. As well as I remember it was in his yard.

Mr. Whitla: That is all.

Cross Examination

By Judge Hunt.

Q. Are you sure it was in his yard?

A. As sure as I am telling you, I said as well as I remember.

Q. You were talking about draining Mirror Lake. A. Not draining Mirror Lake.

Q. What did you talk about?

(Testimony of Robert R. Nelson.)

A. Cutting hay.

Q. In 1939 when you went to cross this Mirror Lake area, you [195] went all around it did you?

A. No sir.

Q. You said you were going across the area and you fell in a water hole.

A. Yes I stepped in a hole.

Q. That section comprises two or three hundred acres? A. I don't know.

Q. You can estimate it.

A. In that end of the District about three hundred, yes.

Q. Did you fall into a spring?

A. I don't know what kind of a hole it was.

Q. It was water.

A. Yes, it was water.

Q. This rim ditch where the tules are, state whether or not there are springs around that.

A. I don't know.

Q. Are there any springs around there?

A. I don't know.

Q. You are farming land belonging to Mr. Woldson? A. Yes sir.

Q. Are you leasing or farming for him?

A. I have a lease with him.

Q. As a matter of fact the District, through its employees, has cleaned out the main ditches every year since you have been there?

A. They cleaned the ditch the first year we were there? [196]

(Testimony of Robert R. Nelson.)

Q. 1939. A. Yes.

Q. In 1940 did they clean the ditches?

A. Yes, I think they cleaned them last year.

Q. Did they clean them last spring?

A. I am not sure.

Q. You stated that this summer you discovered slides obstructing the ditch? A. Yes sir.

Q. I will ask you if that particular ditch was not cleaned out within the past month?

A. I think it was.

Q. And now it is jammed again?

A. Yes sir, the water is backed up.

Q. And to your knowledge this same ditch was cleaned out within the past month? A. Yes sir.

Judge Hunt: That's all.

Mr. Whitla: That's all.

ED. FARNUM,

Being called as a witness on behalf of the plaintiff,
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Whitla. [197]

Q. Will you state your name?

A. Ed Farnum.

Q. Where do you reside?

A. Spirit Lake.

Q. Did you reside in the vicinity of Bonners Ferry ever.

(Testimony of Ed Farnum.)

A. Yes, since 1930 until I went to Spirit Lake about a year ago.

Q. Now what were you doing in the vicinity of Bonners Ferry?

A. Repairing Machines, digging ditches and running draglines.

Q. Have you worked in any of the drainage districts in running the dragline?

A. Practically all of them.

Q. Did you run a dragline in District number 1?

A. Yes sir.

Q. What years? A. 1941 and 1939.

Q. In 1941 who was it that came to you and employed you?

A. Mr. Woldson,—Martin Woldson.

Q. Where did he see you?

A. I believe he came to my station at Spirit Lake.

Q. Did you go up there to work?

A. For about three weeks.

Q. You say you operated a dragline.

A. Yes sir.

Q. Where did you get the dragline?

A. I picked up the dragline on the main ditch.

[198]

Q. Who was working with you?

A. I had an oiler by the name of Ben Banker.

Q. Did you know John Davidson?

A. Yes sir.

Q. Did you have any conversation with him as to

(Testimony of Ed Farnum.)

where you would go to work and what you would do?

A. No sir. I don't think so.

Q. Where did you go to work. Who gave you instructions where to go to work?

A. Mr. Woldson gave me instructions.

Q. Where did you go?

A. On the main ditch.

Q. Where on the main ditch did you start.

A. Approximately two hundred feet west of the junction of the railroad track.

Q. Where did you go with the machine?

A. We cleaned on around to the railroad track and up along the rim ditch.

Q. Did you go north on the main ditch?

A. No sir.

Q. Now with regard to 1939 and 1940 when you first went up there who hired you then?

A. I think the District hired me then.

Q. Mr. Davidson. A. Yes sir.

Q. Did he give you instructions where to go to work? [199]

A. Yes, sent me to the Booster pump.

Q. Was the dragline there.

A. No, it was in District 2.

Q. Who got the dragline?

A. I went after the dragline.

Q. Did they tell you where to go to work when you started.

A. Yes sir, to take it to the booster pump and start to clean there.

(Testimony of Ed Farnum.)

Q. Did they tell you what ditches to clean out?

A. Yes sir.

Q. Where did they tell you to go?

A. I took that main ditch to the junction and then a half mile toward Bauman's, and dead-headed back and went around to the rim ditch on the lateral, and vice-versa.

Q. What is the fact as to whether there is any practical means to clean out a dragline ditch except with the dragline.

A. That is the only practical way.

Q. What did you find about this dragline lateral?

A. In 1939 I could hardly find it.

Q. Did it show whether there had been any work on the ditches for many years prior to that time?

Judge Hunt: Objected to as calling for a conclusion.

The Court: Sustained. [200]

Q. Could you state whether or not there had been work done in these ditches, from your experience.

Judge Hunt: I make the same objection.

The Court: Overruled.

A. It had not been for several years.

Q. What was the character of the growth in there.

A. Cat-tails that had grown up there years before were laying there dead.

Q. Rushes in there.

(Testimony of Ed Farnum.)

A. Plenty of all kinds of weeds.

Q. In regard to the rim ditch what did you find there? A. It was sloughed in places.

Q. As to the condition of the rim ditch at that time. Would it carry water in a practical manner?

Mr. Wilson: We object to that as calling for a conclusion.

Mr. Whitla: I had not finished.

Q. Would it carry water in a practical manner when you went there in 1939.

Mr. Wilson: Objected to as calling for a conclusion and leading.

The Court: Sustained.

Q. Tell us what its condition was as to its ability to carry water?

A. It was not fit to carry water. It was sloughed in and [201] had weed growth in it.

Q. These lateral ditches, were they the same?

A. Yes sir.

Q. This so called main lateral, what was its condition.

A. It was full of growth from the booster pump on up after I got in there where the slides were. There were several slides.

Q. Did you go east of the main lateral?

A. East.

Q. East of the main lateral, toward the Great Northern trestle?

A. Went to the rim ditch.

Q. What was the condition in that vicinity also?

(Testimony of Ed Farnum.)

A. Needed cleaning.

Q. Did you clean out all of those ditches?

A. Yes sir.

Q. What time of the year did you go through there?

A. It was pretty late in the fall. I think we started the 25th of August.

Q. In regard to the time you cleaned out these ditches, what would you say would be the proper time, July or August or later in the Fall?

A. In the very driest season is the best. I would say July or August.

Q. Why?

A. The banks will turn out and stay lighter, they won't cave in so quick. [202]

Q. If the water is drained out at that time what effect does it have on the bank?

A. It stays drier and firm, it doesn't cave in so much.

Q. If the water is drained out at the time, what effect does it have on the bank as to drying out?

A. It dries out faster.

Q. What is your opinion as to whether that land would drain out so you could get in?

Judge Hunt: We object to that, the question is ambiguous, not capable of an answer.

The Court: Overruled, he may answer if he understands the question.

A. It wasn't in any condition to farm when I went in first, but this last time there was lots more of the land farmed.

(Testimony of Ed Farnum.)

Q. In 1939 what would you say as to the water standing around on the surface of the land?

A. We had to wear rubber boots to get to the machine.

Q. That was in 1939.

A. Yes, but this last time we used low top shoes and I never got in any water.

Q. After 1939, Mr. Woldson hired you again in 1941? A. Yes sir.

Q. Where did you go to work then?

A. I went to work about two hundred yards below that junction where that ditch comes from Baumans south and then goes down a ways and swings toward the tracks of [203] the Great Northern.

Q. Approximately how much of this land that you worked in 1939 was in cultivation when you went there in 1941?

A. Looking at it off the machine, it looked like about half of it.

Q. Did any member of the Board say anything to you after you had done this work in 1939, whether they would pay you or not?

A. Mr. Bauman told me plainly after I turned a certain corner they would not pay any more of the expenses.

Q. What corner was that.

A. The bend up by the Great Northern track.

Q. Can you show us about where that was?

(Testimony of Ed Farnum.)

A. Where is the trestle.

Q. Here (indicating).

A. Well, it was in here (indicating).

Q. About where the figure two appears I would take it, in this area, below the south section line of section 4.

A. Approximately.

Q. Did he give you any reason as to why they would not pay any more for cleaning out the ditch?

Mr. Wilson: That is leading. He can give the conversation.

The Court: Sustained.

A. He figured that the District didn't want to pay any money for daining that land. [204]

Mr. Wilson: We move to strike that and that the witness be instructed to state the conversation.

The Court: It may be stricken.

Q. What was said by Mr. Bauman.

A. That they would not pay any expenses after I went around that corner.

Q. Now, Mr. Farnum, do you know anything about the use of what is referred to as spiling for these slides out?

A. Yes, I have drove lots, and there are lots in the district.

Q. Where?

A. From the booster pump out to the pipe.

Q. How much of that is in the District at other places?

(Testimony of Ed Farnum.)

A. I don't know, I never was in there to see except from the pump out to the pipe and from the pipe on out.

Q. How much would you say?

A. I clammed it, I think four or five hundred feet in each stretch.

Q. What does that mean "clammed"?

A. You use a clam shell to get down between the cribbing.

Q. State whether these ditches have to be cleaned out frequently or otherwise where there isn't any current.

A. Where there isn't any current the growth of weeds and cat-tails grows faster, and the laterals bring in much more silt.

Q. What is the fact, in your opinion, as to whether or not you could put in this kind of cribbing or spiling in these [205] places where these slides are, and keep them out?

A. In my opinion a man could.

Q. Did you notice how deep the water was above these slides compared to the depth **below the slides?**

A. In some places it was eighteen inches or two feet.

Mr. Whitla: That is all. You may cross examine.

Cross Examination

By Judge Hunt.

Q. Have you ever put any sheet piling in wet spots like Mirror Lake?

(Testimony of Ed Farnum.)

A. I did on the *Okangon*.

A. Not on the Kootenai.

A. I haven't done any, no.

Q. Could be done, but you haven't done any.

A. No sir.

Q. Last time you were at the District everything was O.K. now, when was the last time you visited District number one, if you remember?

A. I cannot give the dates but somewhere around in July.

Q. Of 1941. A. Yes sir, July or August.

Q. I believe you stated that it was better to do this work in the Summer. I will ask you if you have operated a dragline in any districts during the wintertime? A. Yes sir. [206]

Q. Any ditching? A. Yes sir.

Q. Did you find it better or worse to do that work at that time of the year.

A. Well you had the frost to contend with, but in the Mirror Lake you don't have frost in that springy ground.

Q. That is open the year around. The springs flow in the winter time?

A. Yes sir, I haven't seen it frozen.

Q. Every drainage district has to have its ditches cleaned every year, doesn't it?

A. Yes sir.

Q. I will ask you if it is not a fact that all of the time you were in Bonners Ferry that Drainage

(Testimony of Ed Farnum.)

District number one, had its ditches cleaned every year, at least once?

A. I would not swear to that.

Q. Have you seen them cleaned out even oftener.

A. I only worked there in 1939 and 1941.

Q. And in 1939 you were employed by the District?
A. Yes sir.

Q. And in 1941 part of the time for the District and part of the time for Mr. Woldson?

A. Entirely for Mr. Woldson.

Q. You were not around the District in 1940 at all. You skipped that year.

A. I don't think I did any in 1940. [207]

Q. You were there in 1939 but not again until 1941.
A. That's right.

Q. When you were there in 1939 the dragline you used was rented by District number one?

A. Rented by District Number One.

Q. Did District One own a dragline?

A. Yes, I think so.

Judge Hunt: That is all.

Redirect Examination

By Mr. Whitla.

Q. Does the cleaning out of the ditches as you mentioned apply to all dragline laterals so that all should be cleaned out the same?

A. If they slough off, of course, they should be cleaned out.

Q. Is it customary to do that every year?

(Testimony of Ed Farnum.)

A. Some Districts let it go but it should be cleaned out every year.

Mr. Whitla: That's all.

Judge Hunt: Yes, that's all.

The Court: We will recess at this time until 9:30 tomorrow.

9:30 A. M., November 22, 1941.

ROBERT R. NELSON,

Being recalled, having been heretofore duly sworn, testifies as follows:

Direct Examination [208]

By Mr. Whitla.

Q. You are renting land in this drainage district. A. Yes sir.

Q. District number one. A. Yes sir.

Q. Been farming all your life? A. Yes sir.

Q. Do you know the reasonable rental value of this land involved in this action, provided it is drained so that crops can be produced?

A. Drained the same as the rest I would say on a forty-sixty basis.

Q. I am asking about cash rental.

A. This year about \$15 or \$16.

Q. What was the average cash rental value around there? A. Around ten dollars.

Q. An acre. A. Yes sir.

Mr. Whitla: That's all.

Judge Hunt: No questions.

OSCAR DAVID,

Being called as a witness on behalf of the plaintiff,
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Whitla. [209]

Q. Your name is Oscar David?

A. Yes sir.

Q. Where do you reside?

A. Bonners Ferry.

Q. In Drainage district number 1

A. Yes sir.

Q. How long have you resided there?

A. Since 1926.

Q. In this District since that time.

A. Yes sir.

Q. Did you formerly own part of this land in
controversy in this action? A. Yes sir.

Q. Approximately how much?

A. About fifty acres.

Q. In regard to that land, when did you purchase it originally? A. 1927 or 1928.

Q. How long did you own that land?

A. It was sold for taxes, I believe that was in
1932.

Q. Did you know, or do you know now, who became the owner of it then? A. Yes sir.

Q. And who did purchase it at that time?

A. Mr. Woldson.

Q. Do you know whether he has had possession of it ever since that time? [210]

A. I think so.

(Testimony of Oscar David.)

Q. Are you renting that land from him now?

A. Yes sir.

Q. Have you been farming in that district from 1927 or 1928 up to this time? A. Yes sir.

Q. Then you know the reasonable rental value of that land in controversy, if it was drained so it could be farmed, the cash value?

A. Drained so it could be put in crops?

Q. Yes.

A. Yes, I do. I would say about ten dollars.

Q. Per acre. A. Yes, per acre.

Q. While you were the owner did you do anything toward fencing that land?

A. I built a fence along the highway.

Q. Is your fence still there? A. Yes sir.

Q. What is the fact as to that land being used since that time? A. Used by who.

Q. By the party who owns it?

A. I have had the land.

Q. And what did you do relative to preparing it for crop?

A. I started to build these hand ditches.

Q. Did you work at that continuously until the land was sold for taxes? [211]

A. I think the last year I didn't do anything to it.

Q. In a general way are you familiar with this land and with the ditches? A. Yes sir.

Q. Do you know the ditch referred to as the rim ditch? A. Yes sir.

(Testimony of Oscar David.)

Q. Where does that ditch run?

A. Along the rim of the district.

Q. Close to the Great Northern Railroad right-of-way.

A. Yes sir, between the right-of-way and the District, and then there is some other land between the railroad and the drainage district.

Q. The lateral ditch that drains this hill country, are you familiar with that? A. Yes sir.

Q. What has been its condition as to being kept cleaned out, or whether there are slides in it, or have been in it?

A. It has been in a pretty hard condition. There have been some slides in there.

Q. How many slides in there?

A. Three or four.

Q. With regard to the water. What is the condition of the water above and below these slides?

A. It backs the water up?

Q. How much?

A. I would say two feet or something like that.

[212]

Q. Now then, with regard to the other laterals referred to as the dragline laterals. Is there any ditch or ditches referred to as the dragline laterals?

A. Yes sir.

Q. Up to 1939 what was the condition of those as to whether they were cleaned out for some years?

A. The condition was not very good.

(Testimony of Oscar David.)

Q. Was there any growth in them.

A. Yes sir.

Q. What did that growth consist of?

A. Cat-tails and weeds.

Q. Was anything started to be done there relative to cleaning these ditches out? A. Yes.

Q. What was it?

A. I think they went through with the dragline.

Q. Later on, in 1940 do you know if Mr. Woldson went through with a dragline again?

A. Yes sir.

Q. What effect did that have on the land in this district in *regarding* to making it so you could plow it? A. It helped to drain the land.

Q. And did you plow any of that land after that? A. Yes sir.

Q. How many acres were you able to plow after they went through with the dragline in 1940?

[213]

A. After 1940, probably seventy-five to eighty acres in there.

Q. Did you produce a crop on that land?

A. Yes sir.

Q. What crop did you produce on that land.

A. Whatever you plant.

Q. Of course,—what did you produce.

A. I had part of it in oats. I had considerable more in oats this year.

Q. How much did you have in oats this year?

A. Seventy-five or eighty acres.

(Testimony of Oscar David.)

Q. How much did you get in last year.

A. About twenty-five acres.

Q. With regard to the oats what kind of crop did you have this year? A. Pretty fair oats.

Q. Do you know how much your oats would go, that is, how many bushels per acre.

A. It would be about eighty bushels or something like that.

Mr. Whitla: That's all.

Cross Examination

By Judge Hunt.

Q. As a matter of fact Mr. David, your name is Davis? A. Yes sir.

Q. Your oats on there ran pretty heavy to cat-tails. A. No.

Q. There were cat-tails there? [214]

A. Yes sir in places there was cat-tails.

Q. And in spots it was wet. A. Yes sir.

Q. There were spots where there were more cat-tails than there were oats?

A. I don't know about that.

Q. You farmed it. A. Yes sir.

Q. And there were spots that were heavy to cat-tails. A. Yes, spots.

Q. And there were spots that were heavy to tules? A. That is the same thing.

Q. Cat-tails have the brown top, now what about that stuff that looks like bamboo.

A. We had some of that, not very much. That is where it is too wet to form the tops.

(Testimony of Oscar David.)

Q. Actually the oats run pretty heavy to stock?

A. Some large stocks.

Q. And not much head.

A. Yes, it was a good head, it varies some of course, but it was a good head.

Q. When did you say that you first came to this District.

A. In 1926.

Q. The district was created in 1920 or 1921.

A. It was before I came.

Q. But you know about when it was created.

[215]

A. Yes sir.

Q. Are you acquainted with the original works there when you came.

A. There was not much works there when I came.

Q. Around Mirror Lake it included one big main lateral.

A. In 1926.

Q. In the Mirror Lake section.

A. Yes sir.

Q. This dragline lateral or laterals they were not there in 1926?

A. One that we called the first one, from the main ditch to the highway.

Q. Past the Great Northern trestle west of the underpass.

A. West of the underpass.

Q. These other dragline laterals were not there?

A. Yes, I think so.

Q. Just the one wasn't it.

A. One between McDonald's and Zimmerman's in 1926.

(Testimony of Oscar David.)

Q. Isn't that a part of the main lateral?

A. Yes, I suppose it is. I cannot say what the definition of that would be.

Q. Those were running north and south there?

A. Yes, these two were there at that time.

Q. You are not sure of that.

A. Well, the first one was.

Q. Yes, that main lateral was there. [216]

A. Yes.

Q. Mr. McDonald built his own lateral after the original construction was done?

A. I don't know.

Q. You are renting from Mr. Woldson at this time?

A. Yes sir.

Q. And have been for how long?

A. Since he got the land.

Q. I think you said that was in 1932 you lost it for taxes.

A. I think that is the year.

Q. You referred to a slide in the main lateral, isn't it a fact that these slides appear right after the dragline goes by, and right after it is cleaned up?

A. They will come back, yes sir.

Q. These slides come and go real fast,—at least come.

A. Yes, they come often.

Q. Within a few days after the dragline cleans out the ditch.

A. Yes sir.

Q. Isn't it a fact that during the past three years we have had what is known as dry years?

A. Yes, I would say they were dry years.

(Testimony of Oscar David.)

Q. That is true of the past two or three years previous to this year. A. Yes sir.

Q. Would that have something to do with being able to [217] plow?

A. Yes, to some extent, yet as soon as the water is on the surface you can't plow, it doesn't matter how dry the season is.

Q. Are you acquainted with the pumping in the District the last three years?

A. Not particularly.

Q. Do you know whether pumping is done.

A. Yes, it is *one*.

Q. I will ask you if more pumping was done since 1938 than before that time? A. Yes sir.

Q. Do they pump in the winter as well as in the summer? A. Yes sir.

Q. When did they start to pumping in the winter? A. About two or three years ago.

Q. And each winter they have pumped, since that time? A. Yes sir.

Q. Prior to that time it was not customary to pump in the winter time? A. That's right.

Q. It was not the custom. A. It was not.

Q. Does that pumping in the winter have anything to do with the draining of the land?

A. Yes sir, it helps it. [218]

Q. As a matter of fact there are spring areas in that Mirror lake section that bubble up winter and summer? A. Yes places.

Q. Can you farm those areas?

(Testimony of Oscar David.)

A. Yes, the ditch banks would have to be drained and the ditch dug out again.

Q. How can you drain them.

A. We have drained a lot of them all right.

Q. Those big springs how can you drain them?

A. Just build a ditch in to them.

Q. Can it be done. A. Yes sir.

Q. Just by putting a ditch in them?

A. Yes sir, by putting a ditch in to them and then we put a pole or two in and cover them up, we have a lot of them.

Q. Do you want to tell the Court those springs can be farmed and cropped?

A. The water doesn't come to the surface, we don't see it after we fix them up.

Q. Doesn't the water come to the surface in those places?

A. You mean in the natural way.

Q. Yes,—it does come to the surface doesn't it.

A. Yes sir.

Q. You said that you had some land that went for taxes? A. Yes sir. [219]

Q. That is the same land you say is worth ten dollars per acre?

A. If it was drained for cultivation.

Q. Was there an effort made to reclaim it while you were there? A. Yes sir.

Q. And that was not successful.

A. We didn't have enough ditches.

(Testimony of Oscar David.)

Q. Since that time you forfeited your land, and since that time isn't it a fact that the ditches have been increased in number? A. Yes sir.

Q. Isn't it a fact that new and larger booster pumps have been put in? A. Yes sir.

Q. Yet they are still unable to reclaim that land? A. It is getting better.

Q. Year by year. A. Yes sir.

Q. When you left there you didn't figure it was worth while to pay the taxes on it.

Mr. Whitla: Objected to as repetition. He has said that he let the land go for taxes.

The Court: Sustained.

Judge Hunt: That is all.

Mr. Whitla: That's all. [220]

SIMON McDONALD,

Being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Whitla.

Q. Will you give your name to the Reporter?

A. Simon McDonald.

Q. Where do you reside?

A. The last few months at Port Hill, Idaho.

Q. That is in Boundary County?

A. Yes sir.

(Testimony of Simon McDonald.)

Q. Have you ever farmed any land in drainage district number one, in Boundary County?

A. Yes sir.

Q. Referring to the land designated as Simon McDonald in red or pink pencil.

A. Yes sir, I used to own it but I still farm it.

Q. Are you familiar with the charter of the land in that district? A. Yes, I think so.

Q. With regard to this land, are you renting land there now?

A. Yes, that land you just pointed to.

Q. How long have you rented that?

A. For the last three years, 1939, 1940 and 1941.

Q. Do you know the reasonable rental value of this bottom [221] land such as the land in controversy, if it is drained and made suitable for cultivation so that crops can be produced?

A. If it drained, like the land I farmed it ought to average \$10.00 an acre, this year a little better but the last three years the average to Mr. Woldson was a little more than that providing he sold at the marked prices.

Mr. Whitla: That is all.

Judge Hunt: No questions at this time, but I would like to have this witness available to be called as a witness for the defendants.

MARTIN WOLDSON

Being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Whitla.

Q. Your name is Martin Woldson.

A. Yes sir.

Q. You are the plaintiff in this action.

A. Yes sir.

Q. What has been your life's occupation. What have you been engaged in?

A. I have been following construction work.

Q. How old were you when you started in construction work? [222]

A. Between fifteen and sixteen.

Q. You followed that up until the time you quit active work?

A. Yes sir,

Q. Where do you reside now? A. Spokane.

Q. In regard to this construction work you speak of, was it such as building railroad grades and that type of construction?

A. Yes, the same thing.

Q. Just tell the Court what it was, what kind of construction.

A. Building grades, and building embankments to hold water out, and after that it was to dig ditches on this work ditches to drain the low land.

Q. Was that in this District?

A. Yes sir.

(Testimony of Martin Woldson.)

Q. Did your firm do the original work of putting up the embankment in this District?

A. Yes sir.

Q. That was the Firm of Woldson and Digerstrom?

A. Yes sir.

Q. Has that work ever given away so that the river over-flowed in this District?

A. No sir, it stands as good as ever.

Q. When was it done?

A. I think we finished it in 1921 or 22.

Q. Have you been familiar with the land in this District [223] since that time?

A. I have been looking into it from time to time.

Q. Did you acquire land in the district,—I will put it this way,—did you acquire the land in controversy in this case in 1932?

A. There was some land sold for taxes that I had to take up, yes.

Q. Did you buy it for taxes?

A. Yes sir, at that time.

Mr. Whitla: Now I ask to have this marked as exhibit 18.

Judge Hunt: We have no objection.

The Court: I don't think it has been offered yet.

Q. Mr. Woldson, handing you these four deeds marked as exhibit 18 I will ask you if those are the deeds you secured to this land on June 16, 1932?

A. Yes sir.

Mr. Whitla: We offer exhibit 18 in evidence.

The Court: They may be admitted.

(Testimony of Martin Woldson.)

Mr. Whitla: I will ask to have all of these marked as exhibit 19, to save time I will have them all marked as one exhibit.

Q. Mr. Woldson, handing you these instruments, exhibit 19, being tax receipts for 1933, 34, 35, 36, 37, 38, and 39 [224] I will ask you if you paid those taxes, on this land in controversy.

A. Yes sir, I have paid all the taxes that the County Treasurer asked for. All the bills that were presented I paid them all.

Mr. Whitla: I offer these in evidence.

Judge Hunt: No objection.

The Court: Admitted.

Q. Mr. Woldson, I notice on the tax receipts for 1935, I think it is from there on down to 1939,—from 1936 to 1939 that the drainage district taxes marked delinquent. Was there any reason why this drainage district tax was not paid during those years.

A. I attended a meeting with the Commissioners. In that meeting they agreed to eliminate all taxes until the land was drained or taken away from the District. From that time I didn't pay the drainage taxes.

Q. In 1939 to save the land from going to deed did you pay them?

A. Yes sir, I threwed it all up at that time.

Q. About 1939 did you take up with the Commissioners the question of cancelling the taxes as they agreed to do?

(Testimony of Martin Woldson.)

Judge Hunt: Can you be more specific about that Mr. Whitla.

Mr. Whitla: I am only talking about drainage [225] district taxes.

Q. Did you take it up with the Drainage District Commissioners as to cancelling the taxes?

A. I took it up time after time with them and they never did anything about it.

Q. About 1939 what did you do relative to insisting on the Commissioners proceeding to drain that land?

A. Well, I was talking with them from time to time every year trying to get them to do something to drain the land and they would do some from time to time but a very little, and in 1939 I believe they did more that year than they ever did at one time before.

Q. Take the year 1935, did they do any work at all in draining that land at that time?

Judge Hunt: Now I feel that we must object this is not binding upon these defendants when they took office only in 1939 and 1940. These are acts that the two defendants here had no authority to interfere with nor did they have anything to do with them in any way.

The Court: I think I suggested that they were not to be held for any act of the commissioners who held the office prior to their coming in.

Mr. Whitla: This is only to show the condition up to 1939.

(Testimony of Martin Woldson.)

The Court: To show the condition when they [226] came in office, that is as far as it goes.

Q. In 1936 and 1937 did they do any work on the ditches? A. Not as I remember.

Q. Something was said about Mr. Richmond, with a dragline doing some work in 1938, what work did they do in 1938?

A. I remember that he was running a dragline, he started at the booster pump and went toward the Great Northern trestle. I don't know whether it was in 1938 or not, I don't remember the year but he was on the dragline.

Q. Where did he quit that work?

A. At the junction where it turned northeast.

Q. Did he go any further?

A. Not as I remember.

Q. Was what is referred to as the Dragline lateral cleaned out that year?

A. Nothing done that year.

Q. The main ditch, what was its condition at that time relative to whether there was anything in it,—any growth in it.

A. If that is the year Mr. Richmond cleaned it. He cleaned it up that year.

Q. What was its condition before he went through it.

Judge Hunt: To which we object for the same reason. None of this would be binding on these two defendants.

(Testimony of Martin Woldson.)

The Court: And I am allowing it in for the [227] same reason with the limitation, not that these defendants are bound by anything which was done prior to that time.

A. Well, the tules grow pretty fast in that country and it doesn't take long to fill up the ditches.

Q. Were they in that condition that year.

A. I presume they were.

Q. That is, grown up in tules?

A. Yes, I presume they were.

Q. With regard to what you refer to as the dragline lateral that extended south, what was their condition as to being open?

A. They were not open in 1927.

Q. You mean 37.

A. Yes, 1937 and 38.

Q. What was the condition previous to that time?

A. They had been through the previous year. I remember one year they were drowned out in Mirror Lake. The dragline had about two feet of water in it.

Q. Did Mr. Richmond have difficulty there in or near the main lateral.

A. I remember he got off the mats and it went down in the mud.

Q. Was that in this section, or close to the booster pump.

A. Close to the Booster pump on the north side of the ditch.

(Testimony of Martin Woldson.)

Q. In 1939 was there further work done in that section by a man named Farnum?

A. Yes sir, he started at the booster pump and went up to [228] to the junction and four or five hundred feet toward Mr. Bauman's land.

Q. In regard to the dragline lateral did he clean that out?

A. Yes, he crossed the main ditch and went south to the main lateral that goes to the Great Northern Trestle, then followed up the rim ditch and opened up the rim ditch all through.

Q. What was the condition of the rim ditch?

A. It was filled up here and there all over.

Q. Did Mr. Farnum clean that out?

A. Yes sir.

Q. What effect does allowing this water to stand in the ditches have on the banks of the ditches. Whether they stand up better or not so good.

A. No they don't. They have a tendency to slide in when water is allowed to stand in the ditches.

Q. After you take the water off, how long does it take to get the banks back where they are solid?

A. If it is nice dry weather they dry pretty fast.

Q. What time of the year did Mr. Farnum go in there.

A. I think it was in the latter part of July or August. I don't remember for sure.

Q. What effect did Mr. Farnum going through there have on this land. Did it do any good?

(Testimony of Martin Woldson.)

A. Yes sir, it did.

Q. What effect did it have on the water standing on the land? [229]

A. It got in better condition all the way through.

Q. In 1940 what was the condition of the ditches then. Was any work required at that time?

A. Yes sir, it was required to go over all of the ditches.

Q. Mr. Farnum went over them in 1939. How many years had it been since these dragline ditches and the rim ditch was cleaned out before that?

A. A number of years past.

Q. In 1940 were the banks still solid or soft?

A. In some places standing in pretty good shape and in other places soft and sloughed in.

Q. Did you go to the Commissioners and ask for work on those ditches?

A. Yes, I wrote several letters at that time. That is, during that time.

Q. I hand you plaintiff's exhibit 2, and ask you if you wrote that letter on May 10th, of that year?

A. Yes sir.

Q. Did you have any direct response to that letter. Did they write you any letter back?

A. I think there should be an answer.

Q. Or did Mr. Davidson send you any copy of any resolution they passed?

A. I think there should be an answer to that letter.

Q. I have never been able to find such a letter.

(Testimony of Martin Woldson.)

Did you go to see them again relative to that matter? [230]

A. I spoke to Mr. Davidson and told him to report to the Commissioners and there as a number of letters.

Q. Prior to that time, on January 26, 1940 did you write exhibit 4? A. Yes sir.

Q. After you wrote them these letters did they do anything relative to cleaning these lateral ditches through your land? A. They didn't.

Q. So that the water would drain off?

A. No, they refused to do any work.

Q. They had a dragline to do the work?

A. I think the District had three.

Q. Did you do anything,—what did you do relative to hiring dragline to clean out the works so that you could drain the land in order to cultivate it.

A. I wrote them that unless they would do the work that I would do it and look to them to pay me the cost of the work?

A. Did you afterward hire a dragline and operator to clean out these dragline ditches?

A. Yes sir.

Q. Who did you hire as a dragline operator?

A. Mr. Littlefield in 1940.

Q. Who did you rent the dragline from?

A. McDonald and McGlocklin. [231]

Q. In 1940 did you write plaintiff's exhibit 8 and send that with the attached bill for the expenses you had been put to?

(Testimony of Martin Woldson.)

A. Yes sir, this bill and this letter.

Q. Do you have the bills for these expenditures?

A. Yes, I have them all here.

Q. And if you have the checks with which you paid them, will you produce them also.

A. Yes sir.

Mr. Whitla: Now, to save time I ask that all these be marked as exhibit 20.

Q. The bills which have been marked as plaintiff's exhibits 20, are these the bills you paid for the work of the dragline during that time?

A. Yes, those are bills for repairs and so on, and the bills for labor.

Q. You also have shown on there, gas, oil and grease? A. Yes sir.

Mr. Whitla: I will have this marked as 21.

The Court: We will recess for ten minutes and during that time counsel may look those over.

10:45 A. M. November 22, 1941

Mr. Whitla: We now offer exhibit 20 being the bills for the expenses Mr. Woldson paid in 1940 on this work.

Judge Hunt: We object for the reason there [232] is nowhere any showing that the plaintiff was legally authorized to or entitled to charge any items whatever against the drainage district, he not being an officer or an employee of said district, or a commissioner thereof. Second; All these expenses fail to show that any bills were incurred by Drainage

(Testimony of Martin Woldson.)

District Number One; for the further reason that included therein is a letter from the International Harvester Company dated July 11, 1940, which is not a bill at all, and it contains items on the back with no charge whatever, by someone, we don't know who it was. For the further reason that he was at this time engaged in farming operations on this land and there is nothing to show that these charges were actually incurred in the use of the dragline in draining this land or cleaning the ditches.

Mr. Whitla: The witness has testified to all that.

The Court: The Primary objection is that he could not incur any bills against the district. I will reserve ruling on this offer.

Q. The checks plaintiff's exhibit 21, are these the checks actually paid by you for the operation of this dragline in cleaning out these ditches in 1940, which you have testified about? A. Yes sir.

Mr. Whitla: We offer them in evidence. [233]

Judge Hunt: We make the same objection.

The Court: The same ruling, that is, I will reserve ruling.

Q. Each and all these items were they all incurred in doing that work?

Judge Hunt: Objected to as leading.

The Court: Sustained.

Q. What is the fact as to each and all of these items, how were they incurred?

A. These checks are in payment of labor to these people for operating the dragline, for oil, gas, and

(Testimony of Martin Woldson.)

grease, for repairs which were necessary to be made on the dragline. The repairs were necessary to keep it in operation.

Q. What about the rental of the dragline?

A. Yes, and also the rental of the dragline.

Q. Was any part of that money spent on your farming operation, or for any other purpose other than you have stated here?

A. No sir.

Q. Prior to that time and in April 1940 did you go and see Roy Copeland relative to getting this work done?

A. In the spring of 1940 I hunted up Mr. Copeland. I found him plowing in the field by the Fair ground near Bonners Ferry.

Q. Did you ask him about this work?

A. Yes, I asked him if he would not be kind enough to have [234] this work done?

Judge Hunt: Give the conversation.

Q. Yes, give the conversation in full.

A. He told me that that land was operated by Mr. Zimmerman and Mrs Morrison and that they had lost everything they had put in it and there was no reason why I should do the same.

Q. What did you say?

A. I asked him if he thought it was fair to a man who paid his taxes that he should not have his land drained, he said that he had to please those that helped to promote him and to elect him commissioner.

(Testimony of Martin Woldson.)

Q. Now, Mr. Woldson, after you wrote the letter in 1940, in May 1940, did you get a letter from Mr. Bauman and Mr. Copeland?

A. Yes, I got a letter.

Mr. Whitla: I ask that this be marked as plaintiff's exhibit 22.

Q. Now I hand you exhibit 22, is that the letter you received from them, about that date?

A. Yes sir.

Mr. Whitla: We offer in evidence at this time plaintiff's exhibit 22.

Judge Hunt: No objection.

The Court: Admitted.

PLAINTIFF'S EXHIBIT NO. 22

Admitted Nov. 22, 1941

Bonnors Ferry Idaho,

June 3, 1940

Mr. Martin Woldson.

Dear Sir:

In reply to your letter of May 22, will say that we as Commissioners of *Dranage* District No. L will not be responsible for *eny* ditching ordered done by you in mirror lake.

Or *eny expences* in connection there of.

Very Truly Yours

Commissioners

S. M. BAUMAN

ROY COPELAND [443]

(Testimony of Martin Woldson.)

Mr. Whitla: I ask to have this marked as [235] Plaintiff's exhibit 23.

Q. Mr. Woldson, calling your attention to plaintiff's exhibit 23, did you have a tabulation of the taxes that had been paid on that land for drainage district purposes? A. Yes sir.

Q. Is that a correct tabulation?

A. As far as I know.

Mr. Whitla: We offer in evidence tabulation being exhibit 23.

Judge Hunt: We object to this exhibit. It purports to be a statement of certain payments, and is written on the letterhead of Martin Woldson, concerning drainage district taxes on the Oscar Davis land for the years 1925 to 1940, and it has no bearing on the issues in this case whatever. It purports to be a record of the drainage district taxes and there is no identification at all by the person who compiled it.

Q. It shows the Oscar Davis land 363.67 acres, was that treated in one tract?

A. That is the land the deeds call for.

Q. The rest of this land is reclaimed?

A. Yes sir.

Q. The deeds cover it all and you have to take it all and then you break it down?

A. Yes sir. [236]

Q. These taxes that you have introduced are all shown by the records of Boundary County.

(Testimony of Martin Woldson.)

Judge Hunt: I challenge the records there is no showing that these were paid. This witness cannot show the drainage district taxes in this way. There is a way to get that, but surely not this way.

Mr. Whitla: I have the County treasurer here and it will take an hour or so more to go through the record.

The Court: I will sustain the objection.

Q. With regard to this land in controversy, what is the general character of this land for farming purposes if it is drained?

A. Well it is about the best land that is to be found in the Kootenai valley.

Q. If it can be reclaimed and drained so that it can be cultivated. If the Commissioners would do that what would be the reasonable rental value of this land?

A. That land will produce 73 bushels of winter wheat, year before last it——

Q. ——that is the land in controversy or the land adjoining.

A. Adjoining land, last year there was fifty-odd bushels per acre and one of my tenants had peas that produced \$60.00 per acre.

Q. What would you say would be reasonable rental value per acre, cash rental? [237]

A. I would say that \$15.00 to \$20.00 an acre at these figures, at the amount raised would not be out of the way.

(Testimony of Martin Woldson.)

Q. That is from what was actually produced on the adjoining land? A. Yes sir.

Q. In regard to the construction of these drainage ditches, what is the fact as to where these slides occurring at the southeast corner of this lateral, where it turns and goes north, what would be necessary to take care of this situation?

A. A man could drive a few spiling to take care of it the same as we did in the other place.

Q. When you constructed the works there, did you have occasion to do that kind of work in the District? A. Yes sir.

Q. Where.

A. At the west end near Bauman's. We drove Spiling at the Booster pump and we drove spiling near Bauman's, and at one place we put in a 36 inch pipe.

Q. What was the purpose of that.

A. What was the purpose of that work.

Q. Yes.

A. So that the bank would not cave in.

Q. How far is that distance where those three slides occurred?

A. I think that is a distance of about three hundred feet.

Q. And would it be necessary to do that work there or would [238] keeping the ditches cleaned out allow the banks to become staple.

A. If it was cleaned out by July or August.

(Testimony of Martin Woldson.)

Q. Why would it make any difference to do it in August or in July?

A. It bakes and dries the bank.

Q. With this land having been more or less covered with water and the ditches kept full in 1939 and 1940 what effect has it had on the ditches through your land?

A. In the former years they quit pumping and it formed a back-log in the Mirror Lake area that had a tendency to cave the ditches in.

Q. What has been the result of the cleaning out of these ditches, the work you did in 1940 as to the land, that is, making it subject to cultivation?

A. The land has improved, some of it suitable to cultivation.

Q. How much has been in cultivation since you started that work in 1939 and 1940?

A. What land do you mean?

Q. This land in controversy.

A. About a hundred acres.

Q. If these ditches are kept clean and in reasonable condition is there any reason why the balance of that land cannot be put in cultivation?

A. I would say that next year and the year following the whole of the land could. [239]

Q. Those laterals have you done anything to keep them clean?

A. We made some hand ditches and filled them up with poles.

Q. How did you do that?

(Testimony of Martin Woldson.)

A. We dug a ditch about three feet deep and put poles that were three or four inches in diameter—put in a number of them and then cover it up with grass and weeds. That lets the water run out?

Q. Has that been successful?

A. Yes sir.

Q. Is there any reason why substantially all of this land in controversy cannot be put in cultivation if they keep the ditches cleaned out?

A. It all can be in cultivation. I would explain if you would let me. When we got through with the construction in 1921 the country from the booster pump up to Mr. Bauman's land I couldn't walk across it with hip boots.

Q. What was the condition of it before you started this work in 1929?

A. About similar.

Q. What is the condition as far as walking across most of it in 1940 and 1941?

A. I walked across it last fall and this summer and the land had dried up, very much of it.

Q. Mr. Woldson, when you bought this land in 1932 did you pay a sufficient amount to pay all the taxes in full on that land, that is, at the time you bought it? [240]

Judge Hunt: That is objected to as immaterial.

Mr. Whitla: It shows that there was no loss to the drainage district or anyone.

The Court: I will reserve ruling on that.

Q. Did you pay the taxes in full?

A. Yes sir.

(Testimony of Martin Woldson.)

The Court: If I find that it would not be correct and should not go in I will strike it.

Mr. Whitla: That is all, you may cross examine.

Cross Examination

By Mr. Hunt.

Q. In 1921 firm of Digertson and Woldson were contractors. A. Yes sir.

Q. The contractors who built the drainage district works? A. Yes sir.

Q. Was that a partnership or a corporation?

A. A partnership.

Q. You stated on direct examination that your duty was to dig the ditches and drain the land, rather to dig the ditches that were to drain the land?

A. We did the work according to the engineer in charge of the work, he laid out the ditches that we should dig. We had specifications.

Q. You did that work according to the engineer's plans and specifications? [241]

A. He accepted our work.

Q. You did it according to the plans?

A. Yes sir.

Q. I will ask you if it is not a fact that this main lateral through Mirror Lake was a part of the original plan.

Mr. Whitla: Object to that, the record on file shows that it was not.

(Testimony of Martin Woldson.)

The Court: He may ask him. Here is the man who did the work.

Q. Isn't it a fact that the original plans called for one main lateral ditch through the Mirror Lake Area?

A. I don't remember whether it was one or more.

Q. You did the work? A. Yes sir.

Q. You don't remember what work you did.

A. Yes, we went through from time to time with the dragline.

Q. I will ask you if it is not a fact that there was one main lateral through Mirror Lake on the original plan? A. That may be.

Q. Will you state that it is a fact?

A. No sir.

Q. Or that it was not a fact?

A. I don't remember.

Q. I will ask you if it is not a fact that none of these so called dragline laterals were a part of the original plan? [242]

A. They were built by the district.

Q. I asked you if it is not a fact that they were a part of the original plan?

A. My construction contract was to build the dike and main ditch.

Q. That did not include any so called dragline laterals in the Mirror Lake district?

A. That may not be, I don't know.

Q. Don't you remember.

(Testimony of Martin Woldson.)

A. No sir, I don't. We did the work and I had a lot of other things to do and I don't remember.

Q. Isn't it a fact these dragline laterals were constructed several years after you completed the original construction? A. Not several years.

Q. How long. A. One or two years.

Q. You didn't construct them?

A. No sir. The District did that.

Q. That was after the district was completed and your contract was at an end. A. Yes sir.

Q. Are you positive that the district did that or did the individual property owners dig their own ditches and pay for that?

A. The District did that work.

Q. Who paid for it? [243]

A. The district.

Q. You are acquainted with Simon McDonald?

A. Yes.

Q. And with the Simon McDonald land in this District? A. Yes sir.

Q. Mr. McDonald has a dragline on his property?

A. He dug a ditch with a grader.

Q. Who paid for that? A. Mr. McDonald.

Q. Concerning this rim ditch was that a part of the original construction?

A. Yes, it was part of the construction by the district.

Q. Did you do that?

A. No sir, the district did that.

(Testimony of Martin Woldson.)

Q. The original contract was between you and the district? A. Yes sir.

Q. You completed that contract?

A. Yes sir.

Q. State whether or not anything was said about the Rim ditch around the foothills in the Mirror Lake section?

Mr. Whitla: We object to this, we admitted what was done and we alleged it was done by supplemental agreement——

The Court: —But this is proper cross examination, go ahead. This witness was operating under a contract. [244]

A. The district did the work, I had nothing to do with that.

Q. All of this rim ditch that we have been discussing, that work was done by the district afterward? A. Yes sir.

Q. I will ask you if it is not a fact that was at the expense of the property owners concerned?

A. Not that I know of.

Q. Do you know who paid for it?

A. The District put it in and paid for it as far as I know.

Q. Well, do you know? A. Yes.

Q. You know that the District put the rim ditch in? A. Yes sir.

Q. The District paid for putting it in?

A. So far as I know.

(Testimony of Martin Woldson.)

Q. You don't know whether the District put it in?

A. I am sure that the district put it in and paid for it.

The Court: He has answered that twice now, let's get along to something else.

Q. Do you know when these ditches were put in?

A. No, I don't remember the years, I didn't pay much attention to it.

Q. Now, Mr. Woldson, you asked the Commissioners of the District to cancel certain assessments?

A. Yes, or to drain the land.

Q. You stated that you went to them and asked them to cancel [245] certain drainage district assessments?

Mr. Whitla: I don't think that is correct.

The Court: He may answer.

Q. Did you ask them to cancel the assessments?

A. To eliminate the drainage assessments or to drain the land.

Q. By eliminating the assessments you meant to strike them from the rolls? A. Yes sir.

Q. I will ask you if you knew at that time that the Drainage district had no authority to cancel those assessments? A. No, I didn't know that.

Mr. Whitla: Objected to as it is argumentative.

The Court: He said he didn't know.

Q. Were you around the District a great deal in 1940? A. Yes sir, I was around.

(Testimony of Martin Woldson.)

Q. Were you there a great deal in 1937 and 1938? A. I was in and out.

Q. What were you doing in there in 1937 and 1938?

A. I used to go over the District and see what was going on. I had quite an investment there and I was looking it over to see what was going on.

Q. What was the year that the dragline got in trouble up there?

A. Mr. Richmond could tell the year. I don't remember.

Q. Didn't you testify that it was in 1938?

A. It might have been in 1938. I don't know, but Mr. Rich- [246] mond was doing the work.

Q. You know that the dragline got in trouble but you don't know what year it was.

A. It doesn't make any difference what year it was.

Q. It is a matter of your memory on these matters Mr. Woldson. You don't remember the year.

A. No.

Q. This work that Mr. Farnum did, was he employed by the District? A. Yes sir, in 1939.

Q. It was paid for by the District?

A. Yes sir.

Q. You didn't pay for any of it? A. No sir.

Q. I will ask you if you put in any sheet piling at the time you did any of the original construction work?

(Testimony of Martin Woldson.)

A. I don't remember whether we did that after the construction was completed or not.

Q. You say that the sheet piling is proper in this area to drain the land?

A. There are many ways of doing it.

Q. And one way is by putting in sheet piling?

A. Yes sir.

Q. You didn't put in any.

A. The District paid for the work.

Q. You referred to some sheet piling near the Bauman property. [247]

A. Yes sir.

Q. Isn't it a fact that that land is considerably higher?

A. Yes sir.

Q. Springs bubble out of this land winter and summer.

A. Yes, springs bubble out but it doesn't amount to so very much.

Q. Where does that water come from?

A. The foot-hills.

Q. It doesn't come from the springs?

A. The water comes from the foot-hills.

Q. The surface water from the foot-hills goes into the ground and comes out in the shape of springs?

A. Yes sir.

Q. Isn't it a fact that in operating this dragline in there, that you no sooner get past than boils come up immediately behind the dragline?

A. I haven't seen that so far as I am concerned.

(Testimony of Martin Woldson.)

There are places that show wet ground and when you dig it out there may be a little boil come up.

Q. You have seen them come up a few days after the work has been done?

A. No, not a few days after.

Q. How soon do they come up?

A. When they do come up, they come up immediately when you are digging there.

Q. Immediately. [248] A. Yes.

Q. There is considerable testimony regarding a ditch with three or four slides do you know the region where these slides are? A. Yes sir.

Q. I will ask you if it is not a fact that in the spring of 1941 you talked with Mr. Bauman and Mr. Copeland out in the District and at that time they asked you for permission to go around these four slides in order that they might avoid the slides,—first did they discuss that with you?

A. They thought about it, taking off a great big triangle, taking off a corner five or six hundred feet. I told them that it *it* would be too expensive.

Q. It is a fact that in the spring of 1941, Commissioners Bauman and Copeland asked permission to build a ditch around these slides?

A. They talked to me.

Q. They asked for that permission?

A. We were talking about it, whether it would be better.

Q. Yes, and they asked for permission?

A. They didn't ask permission.

(Testimony of Martin Woldson.)

Q. I will ask you if it is not a fact that you refused to construct the new ditch?

A. I don't think I refused any permission, but I told them that it wasn't a good idea to cut off that land behind [249] and asked how could we drain that land behind.

Q. And you told them not to do it?

A. Yes, I told them not to do it.

Q. I will ask you Mr. Woldson, if it wasn't understood in 1921, that every property owner would pay for and put in his own lateral?

Mr. Whitla: Objected to as incompetent, irrelevant and immaterial. There is nothing said about what was understood and who it was understood with. He can state what the contract was.

Q. Was that a part of the general plan?

A. I don't know about that.

Q. You didn't make any private laterals?

A. We completed our contract and let it go at that.

Q. You have been real familiar with the affairs of the District since 1938 and prior thereto?

A. I have been looking into it a little bit.

Q. Looking into it a little bit. A. Yes.

Q. How much pumping was done prior to 1939?

A. What do you mean.

Q. What was the policy as to pumping prior to 1939? A. Prior to 1939.

Q. Yes.

(Testimony of Martin Woldson.)

A. They let the water accumulate on top of the ground and a back-log formed every year. In the spring of the year [250] they had to put the big pump working and it cost a lot of money——

Q. —But what was the policy relative to pumping prior to 1939?

A. I have answered that, I was answering when you interrupted.

Q. Did they pump one month a year or two or three. What percentage of the time was devoted to pumping prior to 1939?

A. I cannot tell how many months but quite a few months.

Q. Did they pump in the Winter time?

A. No, they let it drain out.

Q. Did they pump in the fall after the crops were out? A. After the crops were out.

Q. Yes, after the crops were harvested?

A. Very little.

Q. Since 1939 what has been the policy of the Commissioners relative to pumping.

A. You mean do they pump in the winter.

Q. Yes, do they pump in the winter time?

A. Yes sir.

Q. Has the policy that the Commissioners adopted after 1939 had anything to do with the draining of your land since 1939?

A. With the whole district.

Q. That helped drain it?

A. Yes sir.

(Testimony of Martin Woldson.)

Q. And to put it in condition to put it in crop.

A. We have to have more ditches.

Q. The fact that the Commissioners have caused the pump to run in the winter and summer has been a factor in reclaiming the land in Mirror Lake.

A. Very little in Mirror Lake. In Mirror Lake it has been drowned out and we need more ditches.

Q. If the pumps are kept going all year it helps?

A. Yes, but we have to have more ditches to get it under cultivation.

Q. Isn't it a fact that in 1939 the Commissioners installed a new larger booster pump in the Mirror Lake Area? A. Yes.

Q. I will ask you if that has not been a factor in draining the land in the Mirror Lake area?

A. They put in the latest kind of pump which operates with less expense.

Q. I will ask you if it is not a fact that a larger booster pump such as they installed has not been a factor in draining this Mirror Lake?

A. No, not a bit, but the other pump they had cost more to run.

Q. It is a larger pump having a greater capacity?

A. No sir, we had two pumps, one larger capacity, and one smaller one with less capacity.

Q. How many pumps are there now? [252]

A. Two.

Q. And two before? A. Yes sir.

Q. In 1939 a new and larger pump was installed?

(Testimony of Martin Woldson.)

A. No sir, not a larger one.

Q. It was a new pump?

A. New but not larger. The large pump we had handled more water than this one.

Q. Which one handled the most water the old one or the new one?

A. The old pump that was there, the larger one we had handled more.

Q. In 1939 they got a new one?

A. Yes sir.

Q. And they had two before 1939.

A. Yes sir.

Q. And two since. One was larger you say, now Mr. Woldson does this new booster pump pump more water than the other two pumped?

A. You are talking about the new pump now.

Q. Let me ask this,—which pumps pump the greater amount of water?

A. The old. The larger one of the old pumps still pumps more water than this new one but it cost more to operate, but the new one pumps more than the one they had continuously operating. [253]

Q. Taking the two pumps, did they pump more water before 1939 or after 1939?

Mr. Whitla: Do you mean the capacity now?

Q. Do you pump more water out of there since they put the new pump in or do you pump less?

A. The capacity of the pump, is that what you mean.

(Testimony of Martin Woldson.)

Q. I mean actual water pumped out of that area. You may answer by the hour or the day if you wish.

A. Well, I believe that the old pump will pump more per hour than the new pump.

Q. But you will not tell whether there is more water going out since 1939 than there was before?

A. I don't quite understand what you mean.

Q. Put it this way. Does the booster pump operate more hours per day now than it did prior to 1939?

A. If I remember correctly the old larger pump was an old style but pumped more water per hour than the new pump does.

Q. Prior to 1939 did they have to employ a man to start the pump and to shut it off?

A. Yes sir.

Q. And state whether the new pump installed in 1939 is automatic? A. Yes sir.

Q. In 1939 they put in automatic pumps which automatically started themselves and shut off themselves? A. Yes sir. [254]

Q. Prior to 1939 you started and stopped them?

A. Yes sir.

Q. Does this booster pump pump more water out of that area than it did prior to 1939?

A. You mean per hour.

Q. Yes, we will say per hour.

A. Well I believe the old pump,—the bigger

(Testimony of Martin Woldson.)

pump is still there, and if it is still there that will pump more water off in an hour's time than this.

Q. Two pumps there now or one.

A. Two pumps. You see if they take out the big pump the new pump would pump more water. I am not certain if they left the large pump installed or the little pump installed.

Q. Mr. Woldson, I will ask you if it is not a fact that there is a large area that drains into this Mirror Lake District.

A. Yes sir.

Q. The acreage in the entire district is approximately four thousand, from four thousand to forty-four hundred.

A. Entirely in the district, yes.

Q. The area that you say has not been reclaimed comprises approximately how much ?

A. About two hundred and twenty acres.

Q. This Summer was there two hundred and twenty acres not in crop.

A. No, not this year, but it was not in crop last year.

Q. Now, how much is there? [255]

A. About a hundred acres.

Q. I will ask you if it is not a fact that on at least three occasions that entire southern end of the District has been a lake under two or three feet of water?

A. In the winter time.

Q. At some time during the year.

A. Yes sir.

(Testimony of Martin Woldson.)

Q. Are you acquainted with the dragline lateral that was constructed on the Oscar Davis land?

A. Yes sir.

Q. Do you know who constructed that and paid for it?

A. In former years the District constructed it.

Q. Who cleaned it out.

A. In former years the District cleaned it out.

Q. Do you know who paid for it on the Davis Land.

A. So far as I know the District did. I know I didn't pay for it.

Q. On this one hundred acres that has not been reclaimed, I will ask you if it is not a fact where those springs come out that land is higher than some of the land that has been plowed?

A. That may be. There is so little difference in elevation that I cannot tell.

Q. In 1940 you say that you asked that certain work be done; that it was not done and you told the Commissioners that [256] if they didn't do it that you would and make the District pay for it.

A. Yes sir.

Q. You know Mr. Ashby and Mr. Bauman?

A. Yes sir.

Q. I will ask you if it is a fact that they have some land on their property that is springy.

Mr. Whitla: Objected to as immaterial.

Judge Hunt: May I finish my question.

Q. I will ask you if it is not a fact that Mr.

(Testimony of Martin Woldson.)

Ashby and Mr. Baumen and others have springy areas on their land that has not been reclaimed.

Mr. Whitla: Objected to as incompetent, irrelevant and immaterial. Someone else may have some land that is not reclaimed but that is not an issue here, and this is not a defense in this case.

Judge Hunt: Shows the general situation in the District as a whole.

The Court: Just for that purpose.

Judge Hunt: That is all it is offered for.

The Court: Overruled.

A. I don't know if they have or not.

Q. Mr. Woldson, in your petition here you have set out that a certain Court Order was entered in 1927 and that the Commissioners of the District refused to comply with that Order have you not? [257]

A. What was that order about?

Q. Reading from page 6 of your petition which you signed. "Again the Commissioners of said drainage district number 1 did not comply with said order and decree and said lands remained undrained and not suitable for cultivation, and could not be cultivated and thereafter and about the latter part of the year 1927 or the early part of 1928 the Commissioners of said district presented an application to the court having jurisdiction thereof," and so forth, and then you say that they got an order to complete the works and you say that they did not comply with the order.

(Testimony of Martin Woldson.)

A. They didn't do much of that work.

Q. I will ask you if it is not a fact that, not only did the Commissioners actually comply with the order and do the work but that you individually advanced the money so that the work could be done.

Mr. Whitla: Objected to as that complicates the question when he asks if he advanced the money.

The Court: He is simply asking if he advanced the money and if the work was done.

Mr. Whitla: Is he asking about all of the work.

Q. Didn't you advance the money and take the warrants so that this work might be done in accordance with the Order? [258]

A. I advanced money from time to time. They asked if I would advance the money and I advanced money to them from time to time. I don't remember whether that work was done or not. I think it was done down by the headgate.

Q. I hand you an instrument marked as exhibit 12, being a Court Order dated February 20, 1928, requiring the commissioners to do certain acts. I will ask you to look it over and tell the Court whether you advanced money to the District so that work could be done?

A. I would not say whether I advanced money for this work or not, but I advanced money from time to time. They couldn't get money any other place so I advanced money to them. I don't know whether it was for this work or not, but I did advance money from time to time.

(Testimony of Martin Woldson.)

Q. You wouldn't say that you didn't advance this money.

A. I advanced it from time to time.

Q. Can you say whether you advanced the money for the purpose of assisting the Commissioners in complying with this Order?

A. I cannot say in regard to this order, but I advanced money from time to time.

The Court: He has answered that three times now, let's get on something else.

Judge Hunt: That is all my examination.

Redirect Examination

By Mr. Whitla. [259]

Q. At the time that Court Order, plaintiff's exhibit 12 was entered on the 20th day of February 1928, did you own any of this land in controversy or did you get that in 1932?

A. I got it in 1932.

Q. Did you have any more interest in draining that land in 1928, than you did in any other land in the District?

Judge Hunt: Objected to as not proper redirect examination.

The Court: Overruled.

(No answer given to the question)

DAISY KELLEY

Being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Whitla.

Q. Your name is Daisy Kelley?

A. Yes sir.

Q. You are the Treasurer of Boundary County.

A. Yes sir.

Q. And ex-officio Treasurer of Drainage District Number one?

A. I am.

Q. Do you remember the sale of the land to Martin Woldson in 1932?

A. Yes sir. [260]

Q. Was the amount paid for that land sufficient to pay all the taxes outstanding against that land?

A. It was.

Judge Hunt: Move to strike that as being incompetent, irrelevant and immaterial and having no bearing on the issues here.

The Court: I imagine this goes to decide the matter of title, I understand that the title is denied in the pleadings. Overruled, you may have a question of title here.

Q. As the Treasurer of the District do you know whether Mr. Woldson has paid all the taxes accumulated against that land since that time?

A. He has.

Q. There are no delinquencies against the land at this time.

A. There are none.

(Testimony of Daisy Kelley.)

Q. How long have you been treasurer of Boundary County? A. Since 1931.

Q. Since 1931 what is the fact that all this land sold to Mr. Woldson in 1932 was included in Drainage District number one, and regularly assessed and taxed? A. It was.

Q. Do you have with you the record showing how the taxes accumulating against that property since the organization of the drainage District was paid?

A. No sir. [261]

Mr. Whitla: That is all.

Judge Hunt: No questions.

Mr. Whitla: The plaintiff rests.

Judge Hunt: Plaintiff having rested, defendants now move that the plaintiff's action be dismissed for the reasons:

That there has been no proof to show any dereliction on the part of the defendants Bauman and Copeland and the defendant National Surety Company, the proof being silent as to any malfeasance or misfeasance or nonfeasance upon the part of the Commissioners in regard to their duties as Commissioners of the District.

That the proof is wholly lacking upon which any judgment could be based concerning any money judgment in favor of the plaintiff and against the defendants Bauman, Copeland or the National Surety Company, or at all.

That the proof shows, by the plaintiff's own testimony and the *the* testimony of plaintiff's witnesses John Davidson and others that things in this District were not in the best of order prior to 1939, that being the Plaintiff's own testimony, and commencing in 1939, the year Bauman became Commissioner things picked up; that more work was done that year than ever before, and it is shown by the proof of the plaintiff himself that commencing with the year 1939, the year that Bauman [262] became Commissioners, that the Commissioners in performing their duties have caused the pumps to be operated continuously, in the winter as well as in the Spring and Summer, and that the testimony of the plaintiff himself is to the effect that as a result of this, and as a result of work done in 1939 and 1940 the conditions are better than they have ever been before.

Surely there is no showing of any dereliction on the part of the defendants, but on the contrary the evidence shows the conditions a lot better than they have ever been before as a result of the new policy adopted by them concerning the pumping and other matters.

I don't think this requires any argument your Honor.

The Court: As I understand the law that governs the trial Court there must not appear any evidence at all which would sustain the alleged cause of action of the plaintiff before the trial court would be justified in granting a motion for non-suit or motion of dismissal.

As to the principle of law making members of a Board of Commissioners as appear here, individually liable for damages, it is different than where you sue them acting for the district, or sue the District. When you seek to make an individual liable acting on a Board, the law is stricter. [263]

However there appears to be some evidence here which I think should be explained. I am not speaking now of the weight of it, but there is some evidence that would prevent the Court in granting a dismissal or non-suit. You will recall one statement of the plaintiff I think, that he had some conversation with the defendants asking that this land be put in condition and that they would not do it because it would not be worth it. That is one instance that would require some explanation. He testified that he went to the defendants as officers and asked them to do this work. I think this would warrant me in not sustaining this motion, and would not warrant me in dismissing this case at this time. There is some other evidence in regard to failure and neglect to carry out this Court Order. Understand I am not discussing the weight of the evidence which stands in the record which might sustain this cause of action. The rules are very liberal as to a motion for non-suit, saying that the Trial Court has no power if there is some evidence so I will have to overrule this motion. You may proceed with your evidence. I believe however, it is noon now, we will recess until 1:30.

1:30 P.M. November 22, 1942

J. H. CAVE

Being called as a witness on behalf of the [264] defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Hunt.

Q. State your name? A. J. H. Cave.

Q. Where do you reside?

A. Bonners Ferry, Idaho.

Q. What is your occupation?

A. Civil engineer.

Q. Did you have anything to do with the formulating of the plans for the construction of the drainage district works of drainage district number 1, of Boundary County, Idaho. A. Yes sir.

Q. Can you tell us what you had to do with that?

A. I made the original survey and prepared plans for the construction and supervised the construction.

Q. Supervised the construction.

A. Yes sir.

Q. State what those plans consisted of,—just what they consisted of.

Mr. Whitla: If the plans are in writing they are the best evidence.

The Coure: If he remembers the plans, of course, he may testify about them. [265]

(Testimony of J. H. Cave.)

A. After a preliminary district was formed which gave us permission to make a survey and draw up plans for reclaiming this land, the survey was made from which plans were made and a final hearing was had and bids were called and the contract let for the reclamation works.

Q. What did you have in the way of dikes?

A. A system of dikes.

Mr. Whitla: We object to this again, if this was in writing it would be the best evidence.

The Court: You can request them but it does not prevent this man from testifying as to what he did there.

Q. Did you construct a dike?

A. Yes sir.

Q. And some laterals. A. Yes sir.

Q. Tell the Court what these laterals consisted of?

A. Do you want me to include the main ditch?

A. The main ditch and laterals.

A. The main ditch began some two hundred yards up deep creek from its junction with the Kootenai River, that is south and southeast. One branch went to the Mirror Lake area and another branch to the Fry Lake area.

Q. Did the original plans provide for any lateral other than what is called the main ditch laterals?

[266]

A. None to my knowledge.

Q. You didn't construct any such plans?

(Testimony of J. H. Cave.)

A. Not the originals.

Q. Did the main ditch run through what was then known as Mirror Lake? A. Yes sir.

Q. How did you go through that lake with the main ditch?

A. You mean so far as location is concerned.

Q. What did you do when you went through?

A. The Mirror Lake area was very unstable.

Q. Were you able to build a ditch through there?

A. Not immediately, the original ditch was considered a pioneer ditch. The water was very shallow but the soil was very unstable and not capable of sustaining the equipment.

Q. But you did finally get through?

A. Yes sir, they went in there during the frozen period when they could get on the ice and they used large hoes,—these were unusually large something similar to the hoes that plasterers use and they got as much soil as they could raise on these hoes and they also dug out roots and tules bulbs and that made the pioneer ditch and they left these roots and bulbs so that in addition to making a more or less of a water-way it gave some little support to the ground.

Q. Since 1939 have the Commissioners retained you to make [267] additional surveys in that Mirror Lake area?

A. Yes, it was about 1939, I think it was in 1939. It was within the last year or so that they contem-

(Testimony of J. H. Cave.)

plated,—they wanted to ascertain if it was feasible to construct a ditch down what is usually known as Fish creek. A line of levels was run down there and it was quite evident that it was not practical.

Q. Was Mr. Copeland one of the Commissioners at that time?

A. I think Mr. Copeland, Mr. Bauman and Mr. Davidson were the Commissioners.

Q. Was that plan put into effect?

Mr. Whitla: He just said that it was not practical.

A. It was considered impractical.

Q. In regard to the booster pump, can you tell us how high that water is pumped to put it into the ditch above the pumping plant?

A. I have that data but not with me. I would say it is eight or ten feet.

Q. Mr. Cave, it has been stated here that it would be practical to drain the water in that small section which is unreclaimed by putting in some galvanized iron pipe and running the water through the pipe. Will you state as an engineer in your opinion whether that is practical in that area, to drain it.

[268]

Mr. Whitla: That is objected to, it is immaterial, it calls for a conclusion and it is not a defense to this action.

The Court: This man is an expert, he may ask whether it is feasible or not.

Q. Could that be done?

(Testimony of J. H. Cave.)

A. I would hesitate to say that it is feasible or practical. It is possible. Here are these springs that raise anywhere in that flat, if we place the pipe alongside of them or close to them in this ditch, if it was possible to cover it up so that the ground would not heave up in the bottom of the ditch it might work, I think you would have to tap the spring and bring the spring right to the end of the pipe.

Judge Hunt: You may examine.

Cross Examination

By Mr. Whitla.

Q. Did you prepare any written plans and specifications for the work in this drainage district?

A. Yes sir.

Q. You drew a map and prepared specifications?

A. Yes sir.

Mr. Whitla: I ask to have this marked as plaintiff's exhibit 24, and I offer it in evidence.

Judge Hunt: No objection.

The Court: Admitted. [269]

Q. I hand you exhibit 24 and I ask you if that is a map you prepared at the time,—a copy which you gave to Mr. Woldson at the time you called for bids, and if this is your signature on the map there?

A. I cannot see well enough to say that. That is my map though, but whether it is the map that the plans are drawn on I am not able to say. This map

(Testimony of J. H. Cave.)

here is almost identical except this line, this ditch that runs off here comes in here (indicating)

Q. This is the original map that was prepared when you asked Mr. Woldson to bid.

A. I am not so sure. This may have been drawn first and then, before the construction started, the line of the ditch was brought here and around this way instead of this way (indicating)

Q. This may was one of the maps that you prepared for use and which was used for the original construction of the system?

A. I am not so sure, we have a set of plans,—a plan profile that is on record.

Q. Where is it?

A. It is in the County recorder's office.

Q. Of Boundary County? A. Yes sir.

Q. It will show all these things?

A. Shows the actual location as originally planned. This [270] may have been for preliminary purposes, but after reconsideration, that ditch was brought down here. The ditch comes about in here (indicating). I know that.

Q. The original plan was to put the ditch as shown here?

A. It may have been the preliminary plan, but not the plan that was followed or the one that was used during the construction.

Q Did you do the work for the district when they made changes, when the assessment roll for

(Testimony of J. H. Cave.)

Mirror and Fry Lakes was approved in 1924 or 1925?

A. I think the Mirror Lake and Fry Lake Assessment roll was made at the time the original was presented, but due to the fact that they were undivided those rolls were not presented or shown until later.

Q. Calling your attention to this in your original plan, you had no lateral running north from Section 4 to section 33?

A. I think our profile shows that.

Q. Did you notice any increase when you added the lateral descriptions reserved,—when you had the supplemental report approved in August, August 20, 1924 that you follow the reserved lateral going to and including section 4 and not going into section 33 at all,—strike that—Call your attention to the reservation for the lateral right of way of lateral 1 and lateral 3 which are laterals shown on the map exhibit 24 as crossing [271] Mirror Lake, the lateral was reserved in 1924 running to and upon section 33?

A. I think there is no question about that.

Q. It runs to a point here on section 4.

A. That is what it says. I have an idea that somewhere there was provision made for draining out mud lake?

Q. As late as the approval of this in 1924 that is where the lateral went?

A. I am not so sure about that.

Q. On this map you show Fry Lake and Mirror

(Testimony of J. H. Cave.)

Lake and you show also lateral five running around the foot-hill.

A. That is what is shown on that map.

Q. That shows with the lake in existence.

A. Yes sir.

Q. That was prepared by you?

A. Yes sir, but I think there is another map that shows the ditches and laterals as they actually existed?

Q. You got out maps later.

A. The same map but brought up to date, that map was made prior to the construction, that shows very clearly.

Q. You think that was made prior to the construction? A. I think it was.

Q. That shows the main lateral stopping in the same section four as provided for in the decree.

A. Shows this lateral going up through here (indicating)

Q. That is the pumping area? [272]

A. Yes sir.

Q. Does not show the main lateral beyond section four?

A. Nor sir, but there is still another map.

Q. Calling your attention to exhibit 25 that is the specifications you submitted to Mr. Woldson to bid on.

A. I don't see the commissioners' names so it cannot be the original.

(Testimony of J. H. Cave.)

A. It is filed by them.

A. Yes sir.

Q. By Mr. Kent who was a Commissioner at that time?

A. I don't see the auditor's stamp.

Q. But those are the specifications that you gave out, that you had for the bids to be submitted upon?

A. It is a part of them at least.

Q. That is a copy, one of the original copies given to Mr. Woldson, that he bid on?

A. They look like it. It is a part of our regular form.

Q. Did you have anything more than is on there?

A. I don't see the Commissioners' signature.

Q. You submit the specifications to the bidder and he returns them filled in and signed?

A. Yes sir.

Q. And that is what this shows, filed by Mr. Kent the secretary of the District.

A. That's right.

Q. Would you say that was a copy of the proposal? [273]

A. A copy of part of it at least.

Q. Did you have anything more than that?

A. Not that I know of?

Q. You called for bids,—it was just a unit bid on this and that, it wasn't a bid for the construction of the whole works?

A. I think that is correct.

(Testimony of J. H. Cave.)

Q. Calling your attention to this proposal which we have here. It shows approximately what those things are? A. That right.

Q. Ditching at so much a yard. A. Yes sir.

Q. Diking at so much per yard? A. Yes.

Q. Piling was so much, in place.

A. Yes sir.

Q. Sheet piling so much in place.

A. Yes sir.

Q. Reinforcing steel and rip rap so much per unit? A. Yes sir.

Q. So that you could tell him where to go and what to do and he would follow your instructions, under this proposal. A. That's right.

Q. You didn't give him specifications for the entire embankment there? [274]

A. No, it was built according to the plans of the engineer.

Judge Hunt: If that is offered we have no objection.

The Court: That is exhibit 25.

Mr. Whitla: Yes.

The Court: It may be admitted.

Q. It was known at that time that when you got into this Mirror Lake and Fry Lake area the question of where the ditches would go would have to be governed by the condition you found.

A. Largely, yes sir.

Q. You knew that you would find soft mud in the bottom of the lake. A. Yes sir.

(Testimony of J. H. Cave.)

Q. You had, in fact, made soundings to find that out. A. Yes sir.

Q. You had to do that as an engineer.

A. That's right.

Q. When did you first get this land from under water? A. Fry lake, that was the first.

Q. And Mirror Lake later.

A. Yes, that was brought in on the second year.

Q. The works with the complete specifications were called for in 1931.

A. I think it was 1921.

Q. This shows filed the 30th day of April 1921.

[275]

A. Yes sir.

Q. So it was some time after that that the contract was let to Mr. Woldson. A. Yes sir.

Q. It took about a year and a half to build the main works. A. Approximately.

Q. So that the first time that any of this land would be out would be sometime in 1923, approximately.

A. Either 1922 or 1923, somewhere in there.

Q. You found that it was more mucky in some sections. A. Yes sir.

Q. In the mucky land you know that it takes quite a while to get the land to stand up when you dig ditches? A. That is right.

Q. You even have to redig them and open them up so that the sun can get to them and harden the banks so that they will stand up.

(Testimony of J. H. Cave.)

A. That is correct.

Q. If you let these ditches stand full of water they never will harden up?

A. That is correct.

Q. In order to get these ditches to stand up you arrange a wide top with quite a slope to the bank?

A. Yes sir.

Q. An eight or ten foot slope to a bottom of two or three feet. [276]

A. The bottom was the width of the bucket and the slopes whatever they made themselves.

Q. Didn't you give them specifications?

A. Yes, but they wouldn't stand up to that.

Q. They sloped them more?

A. You see that stuff was just about like water.

Q. It was slimey.

A. Yes sir.

Q. It takes a long time to get that to harden.

A. Yes sir.

Q. To solidify at all.

A. Yes sir.

Q. You have to go through that time after time to get it to harden.

A. Yes sir.

Q. You found that condition in Fry Lake?

A. Yes, but it had dried faster, there were no springs there.

Q. You knew these springs were in the Mirror lake area.

A. Around the edges, but we didn't know they were out in the lake.

Q. You knew they were in existence through section number 5 and that was the reason that the

(Testimony of J. H. Cave.)

lateral was put in to cut off the drainage of those springs? A. That is what it was for.

Q. It was next to the Great Northern and along the edge of the hill. [277] A. Yes sir.

Q. The water seeped out and came in springs along there? A. Yes sir.

Q. You originally planned lateral five.

A. That is not in it.

Q. What is there along here?

A. The boundary of the lake.

Q. That was put in for the purpose of catching these springs to carry it to the main lateral?

A. That was the idea at that time.

Q. That lateral ditch was built early in the construction of this system.

A. No, it was not built during the construction.

Q. When was that built?

A. Sometime after Mr. Woldson completed the job.

Q. And when did he complete the original job?

A. I would say it was in 1922 or 1923.

Q. And after that who did the balance of the work, of completing the job?

A. It was more or less piece meal, sometimes the District and sometimes the individuals.

Q. The District proceeded to get money from time to time to put in these various works?

A. Yes sir.

Q. This proposition that you spoke about trying

(Testimony of J. H. Cave.)

to run out a ditch on Fish Creek. Is that the same as Deep [278] Creek?

A. It did empty into Deep Creek.

Q. During high water there is no drainage out of this district? A. No sir.

Q. The running of water by these ditches cannot affect high water? A. I think not.

Q. It was found not to be practical to run it out that way at any time.

A. Fish Creek is hardly a creek but we call it a creek. It acted as an inlet when the water in the Kootenai River backed up Deep Creek and flooded the whole district area until the water raised high enough to come over the banks near Bonners Ferry and then it courses out through the S & I and then as the water receded the outlet was through Fish Creek.

Q. The water flowed in through Fish Creek and back out as long as the water was high.

A. Flowed in before the water could get over the high bank, then the water found its way into the District through Fish Creek, and then as the water dropped the water found its way out through Fish Creek.

Q. How long did you continue as Engineer for that District?

A. I cannot say. It was off and on from the time of its beginning,—well from its beginning until not so long ago. [279]

(Testimony of J. H. Cave.)

Q. After Woldson and Digerstrom completed the original contract, Mr. Woldson never did any more for the District. A. I don't know.

Q. While you were engineer did he?

A. I don't think he did while I was engineer.

Q. There is complete plan and specifications on file that shows what you did, and you now say that you don't remember what was done?

A. Yes sir.

Q. Now, Mr. Cave, later, in 1928 were you engineer for the District when they changed the outlet structure and put in a lot of pipe?

A. We didn't change the location.

Q. Changed the structure.

A. Modified it and deepened the ditch.

Q. Put in a lot of pipe. A. Yes sir.

Q. Put in a "Y"?

A. Yes. I don't know whether Mr. Woldson was the contractor on that.

Q. That was by day labor wasn't it?

A. I don't remember.

Q. You bought the pipe from the Spokane Culvert Company?

A. I didn't do the purchasing.

Q. Mr. Woldson didn't have anything to do with that work.

A. I am not so sure. I have forgotten whether he did, or [280] whether it was by day labor.

Mr. Whitla: I believe that is all

Judge Hunt: That's all.

A. B. ASHBY,

Being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Hunt.

Q. Will you state your name?

A. A. B. Ashby.

Q. Where do you live? A. Bonners Ferry.

Q. How long have you lived there?

A. Since 1907 or 1908.

Q. Were you a former commissioner of Drainage District number 1, of Boundary County?

A. Yes sir.

Q. When did you become such commissioner?

A. I think it was in August 1927.

Q. And how long did you serve as Commissioner? A. August 1933.

Q. From 1927 to 1933 you served as Commissioner of Drainage District Number One?

A. Yes sir.

Q. Are you familiar with the fact that certain Court Orders [281] were issued.

A. Yes sir.

Q. One in 1925 and a second one in 1927?

A. Yes sir.

Q. Were you Commissioner at the time petition was filed in 1927 asking authority to do additional work? A. What was the date of that.

Q. I don't remember the date, but you remember the circumstances do you? A. Yes sir.

(Testimony of A. B. Ashby.)

Q. I will ask you to state where the Commissioners did comply with that order?

Mr. Whitla: Objected to as calling for a conclusion of the witness.

Q. What did you do and what did the other Commissioners do in an effort to comply with that order in 1927 and thereafter?

A. If I remember rightly we installed the booster pumps and we went through the ditches with a dragline and constructed a floating dredge to go through this Mirror Lake ditch and we experimented with dynamite in the laterals, that was all during this period.

Q. Did you clean out the main ditches with a dragline? A. Yes sir.

Q. Where did you attempt to blow this ditch by the use of dynamite? [282]

A. In the Mirror Lake area south of the main ditch.

Q. Judge Hunt: May I ask counsel if they have the minute book for 1927 and 1928.

Mr. Whitla: We don't have them at all.

Judge Hunt: That I will ask Mr. Davidson for them.

Q. What is the effect of putting a dragline through these ditches so far as cleaning them out is concerned.

A. If the ground is good it makes a good ditch. When we strike unstable ground the banks slide

(Testimony of A. B. Ashby.)

in and very often the ditch closes in behind the dragline.

Q. Closes in. A. Yes sir.

Q. What has been your experience in drainage District Number One, in the vicinity of Mirror Lake relative to the ditch filling in immediately behind the dragline?

A. It happened quite often.

Q. There has been testimony in regard to slides in this vicinity, what are they?

A. I wouldn't call them slides because the banks are low. It is mud and muck that presses into the ditch from the weight of the machine and spoils the bank.

Q. How often did this occur in that vicinity.

A. During what period?

Q. Well, in 1933,—from 1927 to 1933.

A. It was frequent in those days. [283]

Q. What do you mean by frequent?

A. Every fifty or a hundred feet.

Q. How often as to period of time.

A. Sometime immediately after the dragline passed, and others developed a few days after or possibly a month after.

Q. Mr. Ashby, were you the owner of real estate in that immediate vicinity?

A. Not the immediate vicinity.

Q. How close is your property?

A. A mile and a half or two miles.

(Testimony of A. B. Ashby.)

Q. You never abandoned any real estate in this vicinity that you owned? A. No sir.

Q. How long have you known this territory in general? A. Quite a long time.

Q. Since you have been up there.

A. Yes sir.

Q. And that has been how long.

A. Since 1908.

Q. Since 1920 has Mirror Lake overflowed occasionally or often?

A. Quite often in the early part of that period.

Q. How often since 1930. That is, approximately.

A. I wouldn't state how often, but almost every year until [284] the last three years Mirror Lake had water in it.

Q. When you were Commissioner how much pumping was done, how many months and during what season of the year.

A. From four to five and a half months.

Q. Do you still,—was that in the winter.

A. No sir.

Q. Do you still own land in this District?

A. I do.

Q. How much have they been pumping in 1939, 1940 and 1941? A. I understand every month.

Q. I am handing you minutes,—a portion of the minutes of Drainage District Number One, and referring to the instrument marked exhibit 10, look at this and tell us if you are familiar with those minutes? A. Yes sir.

(Testimony of A. B. Ashby.)

Q. In June 1928 you were Commissioner?

A. Yes sir.

Q. Calling your attention to the exhibit, it says "Martin Woldson Warrants 242, 243, 244 and 245 for purchasing material and labor in accordance with Court Order, \$4,000.00." State whether or not that refers to the Order of 1927.

A. Yes I presume it does.

Q. And further on in the same list, "Warrants to Martin Woldson for purchasing material and labor in accordance with Court Order, warrants number 247, 249, 250, 251, [285] 252 and 254, \$7,000.00" was that paid to Mr. Woldson for money advanced for the purpose of complying with the Court Order of 1927?

A. I think it was.

Q. Without repeating in each instance, this next list of warrants numbered 256, 257 and 258 was that for the same purpose?

A. The same.

Q. Further down in the minutes there is another warrant to Mr. Woldson for \$2,000.00 was that to pay him for money advanced for the same purpose, to comply with that Court Order.

A. It was.

Mr. Whitla: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. Referring to the minute under date of the 7th day of September 1928, it refers to an item to Martin Woldson a warrant for labor and ma-

(Testimony of A. B. Ashby.)

terial for \$2,000 was that issued to Martin Woldson for money advanced by him for expenses in complying with the Court Order of 1927?

Mr. Whitla: Objected to as calling for a conclusion of the witness. A. It was.

The Court: Yes, it would be a conclusion of this witness. [286]

Q. I will refer to the minutes of the meeting of the Commissioners of Drainage District number 1 for the 17th day of October 1928, shows the following bills, Martin Woldson labor and improvements \$1000.—ditto \$1000.—ditto \$1000.—ditto \$1000. Can you state what it was for?

A. Yes, it was for improvements in the District. Part of this money was in the area down toward the headgate and part of it was in the Mirror Lake District. It was all for the Drainage district.

Q. Can you say what percentage was expended in the Mirror Lake Area. What percentage of the total. Just your best estimate.

A. That is very hard to say. It has been quite a long time. It might possibly be as high as forty per cent.

Q. You don't know. A. No sir.

Q. And that is your best estimate?

A. Yes sir.

Q. It might run as high as forty per cent.

The Court: It is apparent he is guessing at this.

Q. I refer you now to the minute of the 27th

(Testimony of A. B. Ashby.)

of November 1928, and I call your attention to the following bills allowed. Among others is one Martin Woldson labor and improvement \$3000. Can you state what it was for? [287]

A. Improvements in the District.

Q. Was that in accordance with instructions given in the Court Order?

Mr. Whitla: Objected to as calling for a conclusion.

Judge Hunt: I don't think that calls for a conclusion on his part.

The Court: He may ask why they spent the money.

Q. Why did you spend that money.

A. Trying to comply with the Court Order.

Q. That refers to all these funds?

A. At this time I am sure it was all, yes.

Q. Now, the 2nd of March 1929. I call your attention to the meeting of that date, and to the following bills, Martin Woldson for labor and improvements \$139.00 and another to Martin Woldson. Labor and Material \$3000. State what that was paid for? A. This was in 1929.

Q. Yes.

A. To the best of my knowledge a continuation of the work we were doing.

Q. On the minute of the meeting of the second of April 1929, I call your attention to the following bills, Martin Woldson for labor and improvement \$600.00, state what that item was for if you know? [288] .

(Testimony of A. B. Ashby.)

A. The same purpose as the others.

Q. Referring to the minutes of the meeting of the Commissioners of the 9th of August 1929, I refer to the following bills allowed: Martin Woldson labor and improvements \$600.00; Martin Woldson Labor and improvement \$600.00; Martin Woldson, same purpose \$600.00; Martin Woldson \$500.00; Martin Woldson \$500.00 and Martin Woldson \$500.00 state to the Court what those items were for?

A. The same general purpose.

Q. The same purpose as what?

A. As the other you mentioned.

Q. Were you a Commissioner at the time the dredge was built by the District for the purpose of working in this vicinity?

A. Yes I was.

Q. Did you and the other Commissioners purchase a dredge?

A. We built it.

Q. Did you use it?

A. Yes sir.

Q. What was the result of the effort to use the dredge?

A. Where the ditch was wide enough and carried enough water and the banks not too high it did very well. In other portions it didn't do so well. It cannot work in the narrow laterals, and it cannot work in the deep ditches near the headgate because the banks were too high.

Q. State whether or not the Commissioners in 1927 and during the time you were on the Board, had an agreement with [289] Mr. Woldson concern-

(Testimony of A. B. Ashby.)

ing the advancement of cash to the District for the purpose of doing work in the District?

Mr. Whitla: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer yes or no.

A. Yes sir.

Q. What was that agreement?

Mr. Whitla: I object to that as a collateral issue and not involved here.

The Court: It might lead up to what he used it for. I think he may answer. Overruled.

A. For every one thousand dollar warrant we issued to Mr. Woldson he gave us nine hundred dollars.

Mr. Whitla: We move to strike that, it is prejudicial and it was put in for that purpose. There is no such allegation raised and no such issued in this case at all. This matter has all been tried out and settled.

Judge Hunt: In what case?

Mr. Whitla: In the Richmond case.

The Court: It may be stricken.

Q. Did Mr. Woldson advance money for the purpose of completing the work under the Court Order in 1927?

Mr. Whitla: Objected to as repetition.

The Court: He may answer.

A. Mr. Woldson advanced money to do the work to comply with [290] the Court Order of 1927.

Q. The Court Order of 1927.

(Testimony of A. B. Ashby.)

A. He did not advance all the funds.

Q. He advanced part of them? A. Yes sir.

Q. These items that I read were items advanced for that purpose? A. Yes sir.

Q. Do you have any of those so called dragline laterals on your real estate in District number one?

Mr. Whitla: Objected to as collateral to the issue here in this case.

The Court: Sustained.

Q. During the time you were Commissioner of the District were you able to reclaim all of the land in the Mirror Lake District? A. We were not.

Q. Why not. What was the character of the land there?

A. We couldn't get the water into the ditches.

Q. Why not, tell the Court?

A. The land was so thoroughly saturated from pressure from below, the land was like a sponge, the surface water would drain off in little depressions like a cow track and that would hold the water for days alongside the ditch. And that is true today.

Judge Hunt: That is all, you may cross examine.

[291]

Cross Examination

By Mr. Whitla:

Q. What land is there in the Mirror Lake district that acts that way?

A. I have some that acts that way.

Q. In the Mirror Lake area? A. Yes sir.

Q. You didn't get the Simon McDonald land reclaimed did you?

(Testimony of A. B. Ashby.)

Judge Hunt: He just objected to my going into the question of this other land.

Mr. Whitla: This is in the District he is testifying about.

The Court: He may answer.

Q. You didn't get the Simon McDonald land reclaimed did you, so that it could be put in cultivation?

A. I am not familiar with the boundaries of the Simon McDonald land.

Q. How many hundreds of acres was there that you didn't get reclaimed in the old Mirror Lake?

A. In what period.

Q. While you were Commissioner?

A. I think we had it pretty well reclaimed except three or four hundred acres.

Q. As a matter of fact McDonald and others let their land go for taxes because that land could not be farmed?

A. I beg your pardon. [292]

Q. How many acres went for taxes in 1932 because it could not be farmed?

A. I cannot say.

Q. You say the land acted like a sponge. Did it soak up the water and not give it up?

A. Well, I am referring to the land south of the ditch.

Q. You mean the water won't run down hill if they have a ditch there?

A. The surface water will get to about a hundred per cent saturation and won't leave the land.

Q. You spoke about pumping water off this

(Testimony of A. B. Ashby.)

land. Up to what time did you pump water off this land so that there wasn't water standing on it for a good many months of the year.

A. After the booster pumps were put in.

Q. When was the booster pump put in?

A. I don't remember.

Q. After you ceased being a commissioner?

A. I put that in.

Q. And what year was that?

A. I am not sure.

Q. But you just testified about it. You testified that it retained water on it every year up until when, in the winter time.

Judge Hunt: Do you understand the question?

[293]

A. No I don't just understand.

Q. You testified that Mirror Lake overflowed and that the water stood on the surface up until about three years ago.

A. Yes, in the winter time.

Q. In the winter time the water stood on the surface of the land every year while you were Commissioner?

A. Yes, in the winter time.

Q. You knew that when the water stood in the ditch that the banks could not harden?

A. Not very well.

Q. You would have to wait until the water drained out and then the banks would slough in?

A. To some extent, yes.

(Testimony of A. B. Ashby.)

Q. You knew that as long as that condition existed the land could not be reclaimed?

A. Part of it.

Q. And this is what that Court Order of 1928 was to take care of?

A. We did the best we could with it.

Q. You stated that the money you got from Martin Woldson was used for certain purposes. Referring now to the first item that counsel called your attention to, being that money you got on the 27th of November 1928, where was that money expended and for what labor and [294] what improvements?

Judge Hunt: May I object to this now. It is not a proper item to base this question on. The books show the date the warrants were issued and not the date they got the money.

Mr. Whitla: I will add so far as any evidence shows this date.

The Court: He says that it shows the date of the warrant.

Q. You never got any money until the warrant was issued, did you?

A. We got the money when we needed it.

Q. You didn't get it until after the warrant was issued?

A. No sir.

Q. I will ask you where the money for which the bill was allowed for \$3,000.00 on the 27th of November, was expended, and what improvement was made?

A. I cannot answer that, off-hand.

(Testimony of A. B. Ashby.)

Q. Do you know?

A. It was for the works. General improvements.

Q. Now, the particular items authorized by the order of February 20, 1928 that were specified was for sump construction at the outlet?

A. The main outlet.

Q. Yes? A. I suppose so. [295]

A. Are you testifying from any record or from what you know?

A. From what I know, but the dates may have some bearing on this.

Q. Do you know what the order provided for?

A. Not off-hand.

Q. Calling your attention to the estimated cost of the emergency work attached to that Order, did you know the various things listed. 1200 feet back fill present ditch "Y" to the outlet \$1500.00 when was that done if ever?

A. This was all under that plan of work.

Q. When was that part done?

A. This was done,—this work was done first.

Q. The next, Sump Construction \$1,100.00. How much did you spend for that? A. I cannot tell.

Q. Twelve hundred feet of forty-eight inch wood pipe. How much did you spend for wood pipe and how much wood pipe did you use?

Judge Hunt: I object to this as not the best evidence. The warrants would show, and the question is too general.

(Testimony of A. B. Ashby.)

The Court: If he knows he may answer. This is cross examination.

Q. Do you know when the sump construction was done and how much it cost? [296]

A. I don't know.

Q. Was there any forty-eight inch wood pipe used? A. I don't think so.

Q. What took its place?

A. Corrugated pipe.

Q. There is an item "preparing ditch for pipe" how much was the cost of that?

A. It was done at this time but I cannot say as to the cost of it.

Q. Changing the pump and so forth, two hundred dollars. Was the pump changed?

A. I don't know what pumps it refers to.

Q. Lowering the outlet structure south of the present. Do you know when that was done and the Cost of it?

A. I cannot state the cost, but it was done.

Q. Five hundred and fifty feet of forty-eight inch pipe south of "Y" in place, do you know the cost of that work? A. I don't know.

Q. Back fill south of "Y". Do you know when it was done and the cost of it?

A. It was at this time, but I don't know about the cost.

Q. And back fill east of "Y", what about that?

A. It was done but the amount I don't know.

(Testimony of A. B. Ashby.)

Q. And the item of one thousand feet of twenty-four inch pipe, do you know when it was bought if any was bought [297] how much there was and what it cost?

A. I am not sure of the amount bought nor the amount that was expended.

Q. This same minute of November 27, 1928, there is an item to the Spokane Culvert and Tank Company of \$2134.31 do you know what that was for and how much was used in this work?

A. There was several hundred feet of this pipe, and putting in the ditch near the outlet and back fill with dirt. These estimates show the back fill in order to seal some boils in the bottom of the ditch.

Q. Do you know how much of this money was used for labor and improvements? A. No sir.

Q. Have you any record that shows how much of this money was used in any particular place on the District? A. No sir.

Q. It was for the benefit of the entire district was it? A. Yes sir.

Q. The next item I think in March you referred to Mr. Woldson advancing money there. Do you know where it was used and what it was for?

A. General purposes.

Q. The next in April Mr. Woldson advanced \$600.00 do you know what it was used for?

A. The same thing. [298]

Q. That was in 1929? A. Yes sir.

Q. The next was August 9, 1929. Do you know

(Testimony of A. B. Ashby.)

where any of the money that you got from Mr. Woldson at that time was used?

A. In the District.

Q. All the work at that time was at the outlet was it not? A. No sir.

Q. Where was any other work done?

A. We put in the Booster pump and we built a dredge and we tried dynamite, and general ditching in that district, all that was done during that period.

Q. When did you put in the booster pump?

A. I cannot say, except from the record.

Q. Well, take the record and tell us when you put in the booster pump?

Judge Hunt: Do you have any record anywhere so that you can tell us?

A. The booster pumps referred to is the Larson pump.

Q. Do you know when it was put in?

A. During this period but I cannot say the exact date. It was during the period I was serving as Commissioner.

Q. That run to 1933? A. Yes sir.

Q. This work under this Court Order was completed in 1929? A. Completed in 1929. [299]

Q. Yes. That is, as far as spending the amount of money authorized to be spent?

A. I would not be able to answer that.

Q. When did you spend this money authorized?

(Testimony of A. B. Ashby.)

A. During the construction period in 1930, 1931 and 1932 whatever those dates are.

Q. 1931 and 1932 you say?

A. Well, I cannot say as to what years but it was during that construction time.

Q. Can you tell us any ditches built in the Mirror Lake section and when it was?

A. The main lateral. We went through the main lateral with the dredge, first I think with the dragline, I won't be positive about that but I know that we went through with the dredge and I know that we tried to blow these laterals out with dynamite.

Q. What laterals?

A. South of the ditch in Mirror Lake.

Q. Any of the laterals that are there today?

A. Yes, some of them.

Q. Were any dug with the dragline during that time? A. I am not positive of that.

Q. Who ran this dragline at that time?

A. Ed Littlefield.

Q. Do you have a record of what he did in that section?

A. No record but I know he worked there. [300]

Q. You were very hard up. You couldn't get credit and couldn't get any money and you went to Mr. Woldson to finance that? A. Yes sir.

Q. And he did that? A. Yes sir.

Q. Mr. Woldson didn't own any land in that part of the drainage District,—Mirror Lake?

A. I think not.

(Testimony of A. B. Ashby.)

Q. He owned some land in another portion of the District? A. I am not sure.

Q. He became the owner of land in the Mirror Lake section in 1932?

A. If the record shows that.

Q. Were you Commissioner when Mr. Woldson went to the Commissioners and asked to see that his land was drained or to see that he wasn't taxed?

A. What year was that?

Q. During any year that you were Commissioner. Did he go to the Commissioners and ask that he be not taxed or that the ditches be cleaned?

A. I think he did.

Q. And what agreement did you make with him?

A. I wouldn't be sure. It is possible that we didn't assess this land. It is also possible that we refunded him some money. [301]

Q. Did you refund Mr. Woldson any morey at any time for anything?

A. I think there is something that will show it.

Q. If you can produce any record, I will ask you to do so during the recess.

A. I can find where it was authorized but I don't know that I can find where it was actually done.

Q. You say that the mud and muck would slide into the ditch. That is common where the mud is loose and wet? A. Yes sir.

Q. As long as you allow the water to stay high, or the ditch fill up it will slide more?

(Testimony of A. B. Ashby.)

A. No, it will quit when the ditch is full.

Q. When you dig them out then these slides come in?

A. They don't come in when the ditch is full, it is when they are cleaned out.

Q. The ditch fills up so it holds the banks up?

A. Yes, it fills the ditch up.

Q. If you allow the water to stand in them, they do fill up with muck and debris?

A. Yes, that's right.

Mr. Whitla: That's all.

Redirect Examination

By Judge Hunt:

Q. Mr. Ashby, have you ever been secretary of the Commissioners of Drainage District number one? [302]

A. No sir.

Q. Do you have in your possession any original records of drainage district number one?

A. I have not.

Judge Hunt: That is all.

Recross Examination

By Mr. Whitla:

Q. Did you find any minutes showing any refund of taxes of Mr. Woldson's at any time?

A. Record of repayment, there is a minute here. I took it to be taxes but it may not be.

Q. Where is the balance of this so called minute of October 29?

A. I think that is all.

(Testimony of A. B. Ashby.)

Q. That doesn't refer to any taxes at all.

A. I am not so sure.

Q. What does it refer to?

A. I am of the opinion that it was taxes.

Q. It refers to him insisting,—it is a question of the expense of draining Mirror Lake, and also the overpayment on tax sale of \$2644.99,—no that figure is 2464.99, it shows on the minutes that it was an overpayment and there was a refund ordered.

A. It was ordered paid to him.

Q. That is correct?

A. Yes, he was paid \$24.64. [303]

Q. What was that amount? A. \$2464.99.

Q. I thought you said \$24.64?

Q. It shows at that meeting that there was also taken up some settlement in regard to the land Mr. Woldson bought at tax sale in Mirror Lake, an amount of \$2464.99 that was overpaid by Mr. Woldson, said amount was ordered paid.

A. That is what it shows.

Q. You know that there had been an overcharge to Mr. Woldson and that he had overpaid and you ordered it paid back to him?

A. I wouldn't say that.

Q. You voted for that? A. Yes sir.

Q. You didn't know what it was for?

A. I don't know now.

Q. You don't know other than what *is* shows on its face? A. No sir.

Mr. Whitla: That is all.

Judge Hunt: That is all.

FRANK ZIMMERMAN

being called as a witness on the part of the defendants after being first duly sworn, testifies as follows:

Direct Examination

By Judge Hunt: [304]

Q. Where do you live Mr. Zimmerman?

A. Bonners Ferry.

Q. First, give your name to the Court and for the record.

A. Frank Zimmerman.

Q. How long have you lived in Bonners Ferry?

A. About thirty-three years.

Q. Did you become Commissioner of Drainage District number one in 1925?

A. Yes sir.

Q. How long did you serve?

A. Until 1933.

Q. Did you own land at one time in the bottom of Mirror Lake?

A. Yes sir.

Q. How long did you own that land?

A. I think I got it in 1923 and I think I let it go somewhere in 1930 or 31.

Q. You let it go back for taxes?

A. Yes sir.

Q. How many acres?

A. Something over 150 acres.

A. That 150 acres is in this vicinity we are talking about?

A. Yes sir.

Q. It is some of this land?

A. Yes sir.

[305]

Q. Do you own any land in Drainage District number one?

A. Ten acres adjoining this property and twelve on the other side.

(Testimony of Frank Zimmerman.)

Q. Did you attempt to drain this land while you were Commissioner of Drainage District Number One? A. Yes I did.

Q. Tell the Court what the Commissioners did, what they did in an effort to reclaim this land while you were Commissioner between 1925 and 1933.

A. There was a lot of effort made.

Q. Just tell the Court.

A. We all tried to do the best we could on all of that land. We tried something, and if it didn't work then we did something else.

Q. Did you build ditches?

A. Yes we dug ditches. We spent lots of money trying to get some results and we did get a little result but not enough to justify us in keeping going.

Q. Did you built laterals?

A. Yes sir, we dug laterals with the dragline and also by hand.

Q. Were you on the Board when you built a dredge? A. Yes sir.

Q. And when you used some powder?

A. Yes sir. [306]

Q. Where did you use this powder?

A. On my place and some on the ditch below and some on the Oscar Davis place.

Q. Would it make good ditches, or bad?

A. I would not recommend it for use all of the time. We got some good ditches and some not so good.

Q. Who put in the rim ditch?

(Testimony of Frank Zimmerman.)

A. We put that in.

Q. The District, or the property owners?

A. Yes sir.

Q. And it was paid for by the District?

A. Yes, I think so.

Q. Did you operate a dragline in there?

A. Yes sir.

Q. Tell the Court the result that you obtained in using the dragline?

Mr. Whitla: Establish the time please.

Q. Between 1925 and 1933?

A. That is the only time I was commissioner.

Q. Yes, what result did you get from the use of the dragline?

A. In some places we had a ditch and in some places we didn't. Our ditches would slough right in after the dragline moved on. Sometimes right while we were digging, and lots of times they would get past a place and then it would slough in.

Q. Any springs in that vicinity? [307]

A. Yes sir, lots of springs all through there.

Q. Did you ever do any soundings to try and find out how deep the bogs were?

A. I put one pole in there fifteen feet with my hand. I must have hit an open spring there.

Q. Did you put down a pipe in there any place?

A. I did.

Q. What was the result of that?

A. I got water.

(Testimony of Frank Zimmerman.)

Q. What was the result, when you got water?

A. It came out on the ground.

Q. Out through the pipe? A. Yes sir.

Q. Did you invest any money of your own in an effort to reclaim that land? A. I did.

Mr. Whitla: Objected to as incompetent, irrelevant and immaterial and not an issue in this case.

The Court: I have allowed the plaintiff to go back to a time before these two defendants were Commissioners, only as to what the conditions were up to the time they went in office to see what conditions confronted them. Plaintiff claims here that they didn't do anything to correct the condition. I think this is proper to show the physical conditions.

[308]

Q. Did you spend any money of your own in an effort to reclaim your land? A. I did.

Q. How much?

A. I think I have better than \$6,000.00 in there that I spent.

Q. What was done there?

A. I hired men to dig ditches, of course on one side there was quite a lot of brush on the low ground.

Q. Anything else?

A. I had men in there ditching and plowing and trying to cultivate some of the ground.

Q. After you plowed it did you seed it?

A. Yes sir.

Q. What did you plant?

(Testimony of Frank Zimmerman.)

A. Timothy and alsike?

Q. Were you able to harvest it? A. No sir.

Q. Did the tules and cat-tails come in?

A. Yes.

Mr. Whitla: Objected to as leading.

The Court: Yes, it was somewhat leading.

Q. How old are you Mr. Zimmerman?

A. 73.

Q. During the time you were Commissioner, did you as a property owner—strike that please—During the time you [309] were Commissioner state whether or not a double assessment was levied in this Mirror Lake District for the purpose of draining that land?

Mr. Whitla: Objected to as incompetent, irrelevant and immaterial for the reason that no double assessment could be legally levied.

The Court: We are not questioning the legality of it at this time, this or any other assessment. He is only showing what was done in trying to drain this particular district. It is not a question of whether this assessment was legal.

Mr. Whitla: I make the further objection that the record of the assessment would be the best evidence.

The Court: Of course, you are right on that. You ask now if the assessment while he was Commissioner was a double assessment.

A. I think there was.

(Testimony of Frank Zimmerman.)

Mr. Whitla: Now I move to strike the answer of the witness.

The Court: He is telling what is in his mind. He says he thinks there was. I will allow it to stay in the record. He speaks from his best memory now.

Q. Referring to the minutes of Drainage District number One, being the instrument marked as

EXHIBIT 26,

I will [310] ask you if that is a part of the minutes of the Commissioners meeting of September 7, 1928.

A. Yes sir.

Q. Referring to this portion of it:

“A motion was made by A. B. Ashby seconded by Frank Zimmerman that about 1600 acres be classified as class number 2, and be assessed at the rate of two per cent to four per cent extra to be known as the booster pump expenses.—

Mr. Whitla: —now I object to that as incompetent, irrelevant and immaterial, it is too indefinite and uncertain and not being a levy authorized. It does not show any statement of any amount, and cannot be certified to the County Auditor as a levy——

The Court: I think he should be allowed to finish his question.

Q. Continuing with this minute:

“A resolution was also passed that one hundred acres belonging to Frank Zimmerman,

(Testimony of Frank Zimmerman.)

forty acres belonging to Oscar Davis and twenty acres to Martin Peterson and twenty acres belonging to Simon McDonald, be exempt from paying at present.”

Motion was made by Frank Zimmerman and seconded by Mr. Ashby and carried and then there was a motion for adjournment.

Mr. Whitla: We object to that as incompetent, irrelevant and immaterial. It is too indefinite and uncertain and does not show any amount to be realized. [311] It shows that some 1600 acres should be assessed two to four per cent and that certain lands were exempt, and it is not a resolution to levy any amount whatever.

The Court: It shows that land was exempt.

Mr. Whitla: It doesn't show what land is to be assessed.

Judge Hunt: It shows that there is to be a two to four per cent extra levy. If this was approving the levy we would concede his objection. They come in here and say that these two defendants do certain things, now this testimony just shows the general intent to show that the Commissioners did certain things to try to comply with certain Orders and to try and drain this land. This man was a Commissioner and at that time he said we will assess this property two to four per cent more to try and drain this land.

The Court: I will allow it to go in, it goes merely

(Testimony of Frank Zimmerman.)

to the weight of the testimony.

Judge Hunt: We offer it in evidence.

The Court: Yes, it may be admitted.

Judge Hunt: That is all, you may cross examine.

Cross Examination

By Mr. Whitla:

Q. To what 1600 acres did that refer to?

A. What 1600 acres, why that didn't refer to 1600 acres. [312]

Q. It says that about 1600 acres be classified as class number 2.

A. That is the different classification of land in this district, if you want to look it up you can.

Q. What 1600 acres were you referring to as classification number 2.

A. That was Mirror Lake, there was more land than there is now.

Q. What land did it cover?

A. I wouldn't know that.

Q. In what section was it?

A. I cannot give the section.

Q. What land is it?

A. Well, down here is some land with timber and brush on it.

Q. What land is it?

A. Doctor Stenberg had some in there.

Q. That land was in Section Thirty?

A. Well, he has a little timber land in there.

Q. That was included in that 1600 acres?

(Testimony of Frank Zimmerman.)

A. I don't know. I don't remember just where that 1600 acres was. There are different parcels of land in there.

Q. You were going to make a levy at the rate of two per cent on some and four per cent on some?

A. That was on my own land.

Q. This says two per cent to four per cent.

A. Yes sir. [313]

Q. What land were you to assess at two per cent and what land at four. A. I don't know.

Judge Hunt: That is objected as simply quibbling.

The Court: He answered that he didn't know.

Q. One hundred acres belonging to you was exempt from this? A. It was put back on.

Q. The resolution mentions 100 acres belonging to Frank Simmerman, forty acres belonging to Davis and 20 acres belonging to McDonald and twenty acres belonging to Peterson, and being exempt from paying at the present time.

A. Yes sir.

Q. Then you got a hundred acres exempt from paying anything at the present time, that is correct isn't it?

The Court: It reads that way, and he said this is the minute of the Board, let's get along.

Q. You say that you stuck a pole down fifteen feet at one place?

A. That was on the line of Oscar Davis and my land.

Q. Whereabouts?

(Testimony of Frank Zimmerman.)

A. In the swamp. If you want me to I could take you to the place.

Q. Yes, I would like to know where it is.

A. I cannot tell where it is, in what forty or what hundred acre patch. [314]

Q. Can you tell us what quarter section?

A. No sir.

Q. You got a spring there by putting a pipe in the ground? A. Yes.

Q. And the water ran in the pipe?

A. Yes sir.

Q. Where was that?

A. That was in the swamp.

Q. Whereabouts was it?

A. Close to the Great Northern railroad.

Q. There is a lot of water comes down from the hills? A. Yes sir.

Q. There is a lateral ditch to catch that water there? A. Yes sir.

Q. And without that lateral ditch you would not be able to drain that land below that at all, or it would be very hard to do that?

A. It isn't drained now with the ditch.

Q. When was that lateral ditch put in, the rim ditch? A. When was it put in.

Q. Yes, when was it built?

A. That was in my time.

Q. When?

A. I cannot tell you the year, the dates these

(Testimony of Frank Zimmerman.)

things happened, but you know it is there and I know it is there. [315]

Q. But I don't know when it was built.

The Court: He has said that, he doesn't remember the dates.

Q. You spoke of a dredge, you built a suction dredge,—a dredge with a pump on it.

A. Yes sir.

Q. That is the dredge you referred to?

A. I don't know whether it was just at that time, but, we built a dredge and we used it.

Q. You could use that in some places and in some places you couldn't, is that right?

A. Yes sir.

Q. During your time as Commissioner did you ever get the water off Mirror Lake and complete that work? A. The surface water we did, yes.

Q. How long did that surface water stand on there? A. Some years there was no water there.

Q. What years was that?

A. I am not telling the dates. I don't know, but there was several years that the water was on there in the spring.

Q. Every year there was water standing over the bottoms in Mirror Lake?

A. Some years there was no surface water that I remember.

Q. You remember that?

A. Yes, last year I remember.

Q. A year ago that is correct, but during your

(Testimony of Frank Zimmerman.)

time as [316] Commissioner, you have not been commissioner for about nine years?

A. That is about right.

Q. That land was sold in 1932?

A. That's right.

Q. Your land was not reclaimed so that it could be used. A. I had a few patches.

Q. Was it better toward the last, that is, was it getting better?

A. I had that whole district, nearly all of it plowed.

Q. They let the water come back in?

A. The water was always there.

Q. Did you plow it after the booster pumps were put in?

A. I don't remember when the booster pump was put in.

Mr. Whitla: That is all.

Judge Hunt: That is all.

JOHN DAVIDSON,

being called as a witness on the part of the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Judge Hunt:

Q. You are the same gentleman who testified before in this case? A. Yes sir.

(Testimony of John Davidson.)

Q. I will ask you if at the request of Mr. Woldson you [317] made a compilation from the books you have of District Number One, south of the booster pump?

A. I don't understand that question.

Q. Did you make a compilation of the money spent in Drainage District Number one, south of the Booster pump? A. Yes sir.

Q. I will ask you if you compiled a statement of the Money spend on the Woldson lateral for the years 1933, 1935, 1937, 1938 and 1939 and 1940?

A. Yes sir.

Judge Hunt: I will have these marked 27 and 28.

Q. Handing you defendant's exhibits 27 and 28 will you look them over and tell me if that is the typewritten statement that you furnished being a record of the Secretary of District number one?

A. This part here are the amounts of money spent and are taken out of my warrant stubs. Out of my records.

Q. That is from the warrant stubs and it shows the purpose for which it was spent?

A. These warrant stubs have been marked with the location where the money was spent.

Q. And this is a compilation of it?

A. Yes sir.

Q. Exhibit 28 that was the money spent on the laterals in Drainage District number One, or what is it? [318]

(Testimony of John Davidson.)

A. The money spent on the main ditch in Drainage District Number One.

Q. That is a compilation of the money spent on that ditch south of the Booster pump?

A. So far as I can segregate it, it was.

Judge Hunt: I offer it in evidence.

Mr. Whitla: May I ask a question?

The Court: Yes.

By Mr. Whitla:

Q. What do you mean by as far as you can segregate it?

A. I marked on the stub what it was for and the location where it was spent.

Q. It was from that that you made the segregation and made the exhibit?

A. That is where I made it.

Q. Do you have those same stubs here so that I can see them?

Judge Hunt: Objected to on the ground that it is not proper examination at this time. The Witness testified that he made them from his warrant stubs.

The Court: Overruled, go ahead.

Q. This first warrant here shows to Oliver Campbell, where is that shown on your stubs?

The Court: He can turn his stubs over to you and you can check them during the recess.

Mr. Whitla: I think I can turn right to them.

[319]

Q. This warrant stub number 600 dated August 15, 1933 issued to Oliver Campbell, Commissioner

(Testimony of John Davidson.)

District number 11, for rental of dragline fifty-nine days and charged to the maintenance fund, for \$485.00, is that the one. A. Yes sir.

Q. That shows nothing else on the stub as to where it was used at any time during those 59 days.

Judge Hunt: I make the objection that there is nothing on the stub to identify it at all.

The Court: Now I will give you time to check all these stubs over, but you should do it when we take a recess.

I will reserve ruling on this matter and I will give you time to take these stubs and check them.

Judge Hunt: That is all I have of this witness, I offer the two exhibits.

Mr. Whitla: And I will reserve cross examination until the Court rules.

ROY COPELAND

being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Hunt:

Q. State your name [320]

A. Roy Copeland.

Q. Where do you live? A. Bonners Ferry.

Q. What is your occupation? A. Farmer.

Q. How long have you lived in that County?

(Testimony of Roy Copeland.)

A. Since 1927, the spring of 1927.

Q. How old are you? A. Thirty-six.

Q. You are one of the defendants in this case.

A. Yes sir.

Q. At this time you are a commissioner of Drainage District Number One.

A. Yes sir.

Q. When were you appointed Commissioner?

A. January 1940.

Q. You qualified at that time. A. Yes sir.

Q. Have been Commissioner of that District ever since. A. Yes sir.

Q. Was the exact date of your qualification January 12? A. January 2.

Q. You were appointed January 2, and qualified January 12.

A. Yes, I guess that is right.

Q. Since you became commissioner of Drainage District [321] Number One, I will ask you if you and the other Commissioners have done anything in an effort to keep the ditches open in the southern end of the District, known as Mirror Lake?

A. Yes sir, we have been over them two or three times.

Q. With a dragline?

A. Yes sir, and over these slide areas I think that there have been two different times besides the times we were through the rest of the area.

Q. I will ask you if you ever asked permission to built this ditch around this slide area?

(Testimony of Roy Copeland.)

A. No sir.

Q. Did you have a conversation with Mr. Woldson.
A. No sir.

Q. What did you do, if anything.

A. We had our secretary write him.

Q. What was that.

A. We had our secretary write him.

Mr. Whitla: We object to this, he said that there was a writing——

Q. ——State whether or not Mr. Woldson refused to permit you to build a ditch around the slide area.

Mr. Whitla: ——just a minute, we want to get in our objection, he has said that there was a writing and the writing should be produced.

The Court: Have you that writing. [322]

A. No sir.

The Court: Does the Secretary have?

A. He should have.

Q. Do you know whether Mr. Woldson ever replied in writing, to the District?

A. I cannot say.

Q. You don't know whether he replied orally or in writing?
A. No sir, I don't.

Q. Explain to the Court the condition of these slides?

A. They are classified as slides, I wouldn't call them exactly slides, because in slides the land slides, and it seems that after the dragline goes over this land it settles and it pops up in the bottom

(Testimony of Roy Copeland.)

of the ditch every time it is gone over. If anything, it pops up a little worse right away after the machine goes over it.

Q. There is some testimony that you could, in Mirror Lake, put in sheet piling and thereby hold the banks of the ditches up by that method. State whether or not it is practical.

A. In my opinion it is not practical. The outside pressure will push the piling back out.

Q. Is there any practical way of cleaning out these ditches other than with the dragline?

A. Not to my knowledge.

Q. State whether or not the dragline could be operated [323] on a ditch reinforced with sheet piling?

A. Not a dragline.

Q. How could it be cleaned.

A. You could use a clam.

Q. Is that a special type of dredge.

Mr. Whitla: Objected to as leading.

Q. What would be the effect of the laterals running through sheet piling.

A. Well, you would have to leave a hole in the lagging for these laterals to come in and it would make a weak place and leave a chance to cave in.

Q. State whether or not there would be any filling in of the ditch with silt coming from the laterals?

A. Yes.

Q. They would fill in.

A. Yes sir.

Q. How long were you a farmer in District One?

A. Since 1927.

(Testimony of Roy Copeland.)

Q. Were you familiar with the pumping in 1927? A. Well, not very much, no.

Q. Do you know whether they pumped continuously. A. In 1927.

Q. Yes,

A. I know they did not pump continuously, I know that.

Q. What period of the year did they pump?

A. They pumped during the spring and until after the crop [324] was taken in.

Q. As a rule there was no pumping in the fall and winter. A. No sir.

Q. Since you have been a Commissioner and since Mr. Bauman has been a Commissioner, tell the Court what the policy has been in regard to pumping.

A. Since I have been Commissioner the pumps run continuously, they are automatic, they run whenever there is enough water for them to start.

Q. Every month of the year.

A. Yes sir, every month of the year. They started in the fall of 1939.

Q. State whether or not the year 1939 was a dry or wet year. A. It was a dry year.

Q. What type of a year did we have in 1940?

A. Exceedingly dry.

Q. And what about 1941?

A. The fall has been wet.

Q. And how about the spring?

A. An exceedingly dry spring.

(Testimony of Roy Copeland.)

Q. State whether or not you have more trouble with Mirror Lake in wet years than in dry years.

A. Well, I have never had much experience down there in a wet season.

Q. Explain the type of water that collects in this area, whether it is surface water or spring water or what. [325]

A. It is spring water.

Q. Describe that to the Court.

A. Springs come up in the fields. They are just in different places around there. When they open the laterals up they have to be dug directly in the spring, you cannot dig a lateral two feet from a spring and let it go into the lateral, it has to be tapped into the spring. The ground doesn't give up the water that way.

Q. Will you explain to the Court what type or area the surface water drained there.

A. I don't understand the question.

Q. Explain to the Court the type of area there the surface water drains.

A. There is a large area around this section, I would say there are thousands of acres of land.

Q. And the surface water runs where?

A. It goes into the ground and comes out in this district.

Q. Mr. Copeland, were you in the Court room when Mr. Woldson testified as to a conversation he had with you at your home?

A. I was.

Q. You heard his testimony in regard to that?

A. Yes sir.

(Testimony of Roy Copeland.)

Q. Have you any recollection of such conversation with him?

A. I had a conversation with him but it wasn't all he said. [326]

Q. State the conversation as near as you remember?

A. He came and demanded some work done in this Mirror Lake area and I told him that I couldn't see where we were financially fit to do it at that time. I don't remember what all was said at that time but that was the principal thing.

Q. What in your estimation of the money they spent, would be the percentage that is spent in this vicinity of Mr. Woldson's land?

Mr. Whitla: Objected to as incompetent, irrelevant and immaterial.

The Court: You are asking for only an approximation.

Judge Hunt: That's all.

The Court: He may give that.

A. Since I have been Commissioner approximately seventy-five per cent of the maintenance.

Q. Seventy-five per cent of the money spent for the entire District.

A. Has been spent for the benefit of this Mirror Lake.

Q. How many acres would you consider as being in Mirror Lake area?

A. I should judge six or seven hundred acres, maybe more.

(Testimony of Roy Copeland.)

Q. Were there any new pumps put in since you became Commissioner of District Number One?

A. Yes, we installed three new pumps. [327]

Q. What are they?

A. Two new forty horse power pumps at the headgate and one new booster pump.

Q. This booster pump is used for pumping water from Mirror Lake.

A. The new unit, yes.

Q. When was that installed.

A. In the fall of 1940.

Judge Hunt: That is all, you may examine.

Cross Examination

By Mr. Whitla:

Q. Now this booster pump that you say pumps water from Mirror Lake, how long is the canal leading water to this pump?

A. Approximately two miles.

Q. The booster pump is situated about where. This is the Simon McDonald land (indicating).

A. And this is the road (indicating).

Q. Yes.

A. Then it is in here (indicating).

Q. This lateral runs south from the booster pump and crosses to the southeast corner of this line here by the road? A. Yes sir.

Q. And follows up through section five,—section four, to section 33, goes up and winds around here in section 28 and drains the Mud Lake district.

(Testimony of Roy Copeland.)

A. It comes over here (indicating).

Q. Take it this way. It begins over in the Southeast quarter of Section 28 and runs west to the southwest quarter of section 28 to the corner,—

A. —No it stops in here (indicating).

Q. Where does it stop?

A. About a half mile from this section line.

Q. Which section line?

A. I think this line here (indicating).

Q. It goes up through section 33, the northeast quarter,—

A. —this is Bauman's land.

Q. Yes, it goes across Bauman's and turns here (indicating). A. Due west.

Q. And it drains all this territory in section 33, section 4 and 5 and part of section 28?

A. There is nothing here (indicating) to be drained.

Q. It drains all south of the S & I territory here in section 28 and in here is Mud Lake.

A. In here (indicating).

Q. The northeast quarter of section 33.

A. Yes.

Q. It is the only drainage for section 33. There is no other. A. No sir.

Q. And no other drainage for section 4.

A. No sir. [329]

Q. No other drainage for section 5.

A. No sir.

(Testimony of Roy Copeland.)

Q. No other drainage for the south half of section 32.

A. No other drainage, but nothing to drain.

Q. And it also drains land in section 6.

A. Part of it.

Q. That makes about how many thousand acres?

A. Well that is kind of hard to answer.

Q. Somewhere around 2200 to 2500 acres?

A. Are you asking for the spring drainage or the summer drainage.

Mr. Hunt: May we have what section he refers to now.

Mr. Whitla: We just point out on the map.

Judge Hunt: The record is very confusing on this now.

Q. This main drainage ditch drains about twenty-five hundred acres of all kind of drainage within this district?

A. Yes, when there is anything to be drained.

Q. This drainage ditch that you spend about seventy-five per cent of your money on.

A. No sir, not all of that ditch, I didn't mean that.

Q. Well now, tell us what money you spent in 1940 on this land in the old Mirror Lake Section, for cleaning out the ditch, exclusive of pumping.

A. All the money we used for the dragline for 1940 was in [330] that area.

Q. And that was two days work.

A. I think there was more than that.

(Testimony of Roy Copeland.)

Q. How many times did you clean out these slides. A. In 1940.

Q. Yes. A. I think there was three times.

Q. Mr. Woldson asked you to clean the ditch out and you made an order and put a limitation that there was only two days work to be done?

A. When was that.

Q. In 1940.

A. I don't remember that. It might be but I don't remember it.

Q. On the 10th of August you passed a resolution that you would clean these ditches provided Mr. Woldson would cash your 1941 warrants,—maintenance warrants.

A. Yes, that was in August 1940.

Q. That is the resolution. There was a letter from Mr. Woldson and the same was ordered done provided Mr. Woldson would cash the 1941 Maintenance warrants. A. That's right.

Q. Do you remember any time that Mr. Woldson requested you to clean out that slide or those slides and you added a limitation of two days, that the dragline could only work two days there?

The Court: He said a few minutes ago [331] that he didn't remember.

Q. What did you spend in money besides these three times you cleaned out this slide in Mirror Lake.

A. In August 1940, the dragline started at the booster pump and went south and east to this junc-

(Testimony of Roy Copeland.)

tion, through the slide area and from there it was dead-headed back north to the S & I railroad junction, north to the booster pump,—from there the main ditch was cleaned back to the Booster pump again. This was for the purpose,—Mr. Woldson had informed us if we cleaned that out we might be able to eliminate pumping all of the time with the booster pump and we were trying to cut down the expense of running the booster pump.

Q. Between what dates was that.

A. Between August 10 and September 6. Those are not the exact dates but close.

Q. What was the expense on that?

A. I cannot say exactly.

Q. Does your Secretary have the record?

A. The bills were paid.

Q. Does the Secretary have the record.

A. I think so.

Q. That was generally to assist all of the land that main lateral drained?

A. That was not. That was for the purpose of draining this Mirror Lake area and nothing else.

[332]

Q. That ditch does drain other land.

A. Yes.

Q. There was a slide that backed water up under Mr. Woldson's land.

A. There are slides but it doesn't back the water up.

Q. Doesn't back the water up.

(Testimony of Roy Copeland.)

A. The ditch is deep enough to not back it on the land.

Q. It stands about two feet in the ditch.

A. Yes sir.

Q. And the ditch is three or four feet deep.

A. Six or seven feet deep and nine feet in other places.

Q. Where is the ditch nine feet deep.

A. At the Booster pump.

Q. I am inquiring about the ditches in Mirror Lake. A. No ditches that deep there.

Q. Can you tell us in Dollars and cents how much you spent in Mirror Lake.

A. I cannot.

Q. Now you say that you put in three new pumps, two at the headgate and one at the Booster pump. A. Yes sir.

Q. When was that.

A. The Winter of 1940, or January or February 1941.

Q. The two at the main headgate were for the entire District. A. Yes sir. [333]

Q. The Booster pump took care of all the water that came through that main lateral?

A. Yes sir, it had to.

Q. You say that the pumps run all of the time now. When were these new pumps that run all of the time installed? A. The new pumps.

(Testimony of Roy Copeland.)

A. Weight on the bank causes it to go down and dirt from the bottom comes up.

Q. Weight on it causes it to come in from the bottom of the ditch?

Judge Hunt: Objected to as repetition.

The Court: Yes, it is, but go ahead, we will save time.

A. Yes sir.

Q. Now, Mr. Copeland, if you don't know the amount of dollars and cents spent in this district, you cannot say that seventy per cent is spent in Mirror Lake. A. That is just an estimate.

Judge Hunt: May I correct the record, he said before that there was seventy-five per cent, and Mr. Whitla asks about seventy per cent. [336] But how do *you that* if you don't know the entire cost?

A. Everything that has been done is in that section since I have been Commissioner.

Q. The rest of the District is old and takes lots of work as it gets older? A. Yes sir.

Q. And you have refused to do work other than you have testified to?

A. I think there is a record that shows the same way that I testified.

Q. You passed a resolution stating that, in substance, that this land was of such a character that it wasn't worth the expense of the work, or words to that effect, didn't you?

A. I don't remember.

(Testimony of Roy Copeland.)

Q. I call your attention to exhibit 3. You passed that resolution? A. Yes, I guess so.

Q. You knew at that time that a good part of that land of Mr. Woldson's that he was asking you to drain, was subject to be plowed, and that he was getting it ready for cultivation?

A. I knew that the district spent fifteen hundred dollars on it.

Mr. Whitla: Move to strike that as not responsive.

The Court: It may be stricken. [337]

Q. You knew that Mr. Davis was getting a good portion of that land ready for cultivation.

A. I knew that he was doing some plowing.

Q. Did you go over that to see if it was dry?

A. I think I was there in the spring of 1940.

Q. What time.

A. It was either the first of May or the first of April.

Q. What was the condition of the land Davis was plowing then?

A. I wasn't on that part that he was plowing.

Q. Were you there previous to the time the drag-line was around there in 1940? A. No sir.

Q. Could you see that it was capable of being plowed at that time or not. A. I could not.

Q. If you didn't know the condition in 1939, why did you say that the work was doing no good?

Judge Hunt: Objected to as being argumentative.

(Testimony of Roy Copeland.)

The Court: Overruled.

A. I knew that the dragline had been through there in the fall of 1939 and you could see that the ditches were filling up as fast as they dug them out.

Q. Did you know how high the water stood in the ditches before the dragline went through?

A. No sir, I wouldn't know. [338]

Q. Did you know that after the dragline went through that the water got low enough so that they could plow? A. No sir, I wouldn't know.

Q. Did you know that the water has been getting lower since 1939? A. No sir.

Q. Do you know that part of the main laterals have not been cleaned out?

A. I think they were all gone over in 1939.

Q. Mr. Whitla: That is all.

Redirect Examination

By Judge Hunt:

Q. Counsel has interrogated you in regard to a certain action taken in August 1940, at which time you asked Mr. Woldson to cash the maintenance warrants for 1941. Why did you ask him to cash the warrants?

A. We didn't have any money to clean the ditches.

Judge Hunt: That's all.

Recross Examination

By Mr. Whitla:

Q. You didn't limit it to that area? The area you spoke about? A. To these laterals.

(Testimony of Roy Copeland.)

Q. You knew that you hadn't paid the warrants that Mr. Woldson bought in 1938.

Judge Hunt: Objected to as immaterial. [339]

The Court: He may answer.

Q. You knew that they hadn't paid Mr. Woldson's warrants for work in 1928 under these orders.

A. I couldn't say.

Q. Did you know how many he held?

A. No sir.

Q. And how far back they ran?

A. No sir.

Q. Did you investigate to find out?

A. No sir, I couldn't say.

Q. Did anybody make any statement as to the indebtedness to Mr. Woldson, that he advanced money for?

Judge Hunt: Objected to as cumulative, and immaterial.

The Court: Sustained.

Mr. Whitla: That's all.

Judge Hunt: That's all.

S. M. BAUMAN

being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Judge Hunt:

Q. State your name? A. S. M. Bauman.

Q. Where do you live Mr. Bauman?

A. Bonners Ferry. [340]

Q. You are a commissioner of Drainage District Number One. A. Yes sir.

Q. How old are you Mr. Bauman?

A. Sixty-five.

Q. How long have you lived in that vicinity?

A. Since 1902.

Q. How long have you owned property in the District? A. Since 1904.

Q. Before the District was organized?

A. Yes sir, I owned that same land.

Q. You were appointed Commissioner of the District in June 1939. A. Yes sir.

Q. And are commissioner now. A. Yes sir.

Q. What is the condition of the tule and cat-tail land in Mirror Lake?

Mr. Whitla: Objected to, the question itself inferring that it is all tules.

The Court: Just identify it. It is sustained as to the form of the question.

Q. State the condition of the bog land in the southern end of the District?

(Testimony of S. M. Bauman.)

A. I wasn't there in 1941, in that part of the district.

Q. I don't mean in 1941. At any time.

A. It was swamp. [341]

Q. It was a swamp.

A. Yes, before 1939 I never had anything to do with it. I wasn't there to speak of, only around the edges and it just appeared like a swamp.

Q. After you became Commissioner you went down there. A. Yes sir.

Q. Tell us the status of it at that time.

A. That was in the fall. Parts of it was drying up and others was mirey and soft.

Q. What caused it to be wet.

A. Springs all around there.

Q. Those springs extended over how large an area.

A. Well, practically everywhere I have been over that part of the lake area.

Q. On the edge of the low land, at the foot of the hills, all around the southern end, what is the condition of the springs?

A. I have not been in the southern end any great extent only between the subway and where Oscar Davis goes into his place, that is very swampy.

Q. From the springs.

A. Yes, from the springs.

Q. Is *the* a large area of hillside where the snow runs off, when it melts that it runs to the District?

A. Right there there isn't, but as you go further east [342] there is more hillside.

(Testimony of S. M. Bauman.)

Q. That surface water drains to the District? A. Yes, it cannot go anywhere else.

Q. Where was,—strike that,—were you familiar with the old Booster pump. A. Quite so.

Q. What was that used for?

A. To raise the water out of the sump and throw it over the dam to the ditch below.

Q. How high does that raise the water?

A. Around eight or nine feet.

Q. Were those pumps changed at any time recently?

A. In 1939 when I went on the Board we had a pump that was connected up with two motors, fifty horse electric motor and a fifteen horse power motor. When there was lots of water we used the fifty horse motor and when there was just a little water we used the fifteen. We put in a new one in 1940 about the first of the year.

Q. What type of motor was that?

A. Fairbanks-Morse.

Q. Is that pump automatic? A. Yes sir.

Q. Prior to that time had you had any automatic pump there? A. Not there, no sir.

Q. How does that run, as to months and seasons.

A. The new one. [343]

Q. Yes.

A. That depends on the flow of water.

Q. Is it available to run every day of the year?

A. Yes sir.

(Testimony of S. M. Bauman.)

Q. Does it run every day, if there is water?

A. Yes sir.

Q. That is, if there is water in the sump?

A. Yes.

Q. For how long has that automatic pump been there?

A. We started it about the first of the year 1940. I cannot say whether it was late in December of the first of January 1941,—I mean in 1940.

Q. In 1939 did you have that pump run winter and summer.

A. I don't think it ran all the time until 1939.

Q. Did it run in the winter of 1939?

A. Yes sir.

Q. Why did you pump in the winter?

A. The principal reason is because the Kootenai Power Company—

Q. —The question is why did you pump it out of Drainage District number one in the winter time? A. To get rid of the water.

Q. Prior to 1939 had the Commissioners done any pumping in the wintertime?

A. I don't think so, not to my knowledge.

Q. Now, Mr. Bauman, since you became Commissioner state [344] whether or not it is customary for the Commissioners to clean out the main ditches in Mirror Lake?

A. Yes sir, that is the height of our ambition.

Q. That was the custom.

(Testimony of S. M. Bauman.)

A. Yes, it was our ambition to keep them clean.

Q. How did you do that.

A. We have gone through from the booster pump to the junction in 1940, 1941 and 1939. In 1941 we went quite a bit further and at intervals we had slides cleaned out. When the dragline was operating on the south side of the main ditch whenever it would come handy to reach in and clean out these slides it was done, we would have that done.

Q. How often was that done in 1941, 1939 and 1940? A. In 1940 it was done twice.

Q. In 1939. A. Cleaned it out once in 1939.

Q. Have you cleaned it out this year?

A. Yes sir.

Q. More than once.

A. Yes sir, three times, a part of it.

Q. I will ask you whether or not you had a conversation with Mr. Woldson relative to building a ditch so that you would by-pass these slides?

A. No sir, but the three commissioners went out there after we received a communication and looked over the [345] situation. We didn't see how we could do any good cleaning it out and we decided to build a ditch alongside of it.

Q. Was that done?

A. No sir, we asked our Secretary to explain the situation to Mr. Woldson. I don't know whether he did that in writing but he reported to us.

Mr. Whitla: We object to this unless it was

(Testimony of S. M. Bauman.)

in writing, if there was a conversation it would——

Judge Hunt: ——let me ask another question.

Q. Was the reply to you and Mr. Copeland in writing from Mr. Davidson?

A. No sir, it was oral.

The Court: If this is lost of course they can give secondary evidence. Mr. Whitla is objecting now that the correspondence between the Secretary and Mr. Woldson ought to be produced.

Of course, if they know of no such writing they can give the oral testimony. What does the Secretary say about this? If he wrote to Mr. Woldson of course, that writing should be produced.

Q. Mr. Bauman, would you be able to make an estimate of the approximate amount of your maintenance fund that has been spent during the years 1939, 1940 and 1941 in what we have been discussing as this Mirror Lake [346] district?

Mr. Whitla: We object to this unless he knows how much the maintenance fund was.

The Court: He may answer this question.

Q. My question is if you are able to estimate the approximate percentage that was actually expended in the Mirror Lake section?

A. While I was in in 1939, after I was appointed on the Board, practically all the work we did was in that end of the district.

Q. What about in 1940.

A. In 1940 it covered more of an area. I should say that half of the work we did was in that area.

(Testimony of S. M. Bauman.)

Q. What about 1941?

Mr. Whitla: We make the objection to this question that 1941 is not involved in this litigation.

The Court: He says it is not involved here.

Judge Hunt: They said that the Commissioners never did anything in this area.

The Court: He may answer.

Q. What was done in 1941?

A. Well, I would say that half of our work was in that area in 1941.

Judge Hunt: That is all. [347]

Cross Examination

By Mr. Whitla:

Q. When you say one-half was in that area, do you mean from the booster pump through the main ditch? A. Yes sir.

Q. That main ditch drains more than half of the district?

A. I am speaking of the part of the main ditch we cleaned in 1941.

Q. That allowed all the water to flow from the Booster pump? A. That is true.

Q. Drainage goes through that from over half of the district? A. Yes sir, half of the district.

Q. From the Booster pump?

A. Half of the district back of the booster pump.

Q. Do you know how much maintenance was spent, or how much the maintenance fund was in 1941?

(Testimony of S. M. Bauman.)

A. No sir I couldn't tell off-hand. I didn't have reference to the maintenance fund. I had reference to the work we did in the ditch.

Q. Do you know how much the maintenance fund was in 1940? A. No sir.

Q. Do you know whether you spent half of the maintenance fund in that district?

A. I said we did half of the work there.

Q. Do you figure that on the basis of the maintenance fund?

A. Figured on the mileage we cleaned out. [348]

Q. You figure you cleaned out fifty per cent of the mileage in that area?

A. For that part of the district, benefiting that area.

Q. Do you know how much you spent?

A. In cleaning out the ditches in 1941 I do.

Q. How much? A. A thousand dollars.

Q. You levied in 1940 for 1941? A. Yes sir.

Q. Do you know how much that levy produced?

Judge Hunt: I object to this it is not the best evidence. I ask for the same objection that Mr. Whitla made when I asked about the levy.

The Court: Yes, you objected to this same question. Sustained.

Q. One thousand dollars would not make more than one-ninth of the total maintenance you levied?

Judge Hunt: Objected to as argumentative.

The Court: Overruled.

(Testimony of S. M. Bauman.)

Q. One thousand dollars would not make more than one-ninth of the amount you levied for 1941?

A. Yes, it would be more than that.

Q. Your levy was nine thousand dollars for maintenance that year?

A. Not for maintenance.

Q. How much was it? [349] A. In 1940.

Q. Levied in 1940 for 1941?

A. We had $4\frac{1}{2}\%$ for maintenance and $5\frac{1}{2}$ for bonds.

Q. That assessment was on a valuation of \$204,000.00.

Judge Hunt: Objected to as not proper cross examination and not the best evidence.

The Court: Overruled.

Q. $4\frac{1}{2}\%$ on \$204,000.00?

A. I don't know about that.

Q. Do you know how much maintenance tax Mr. Woldson paid on this land which he owns, which is in controversy here?

Judge Hunt: Objected to as wholly incompetent, irrelevant and immaterial and not proper cross examination.

The Court: The record is the best evidence.

Judge Hunt: That is my objection.

The Court: He gave it in comparison only to the work he did under the assessment, and not as to the amount of the assessment under this levy.

Q. In 1940 what work did you do in this Mirror Lake Section? A. You mean the cost.

(Testimony of S. M. Bauman.)

Q. What work did you do?

A. From the S & I to the booster pump and on down to the junction.

Q. Who did that work? A. The District.
[350]

Q. Who did the work for the District, who ran the dragline? A. Ed Littlefield.

Q. Did Mr. Woldson do any work that year cleaning out these ditches?

A. Not on the north side of the main ditch.

Q. This main lateral that begins out at the booster pump and runs three or four miles?

A. What little work he did there he was paid for by the district.

Q. Do you know what work he did?

A. He did several days work there while he had charge of the dragline on the south of the main ditch. Whenever he got to where there was a slide we asked him to clean it out.

Q. Did you do any work on the dragline laterals outside of the main ditch?

A. On the Mirror Lake Area.

Q. Yes. A. In 1940 you mean.

Q. In 1940 or 1941. A. No sir.

Q. You refused to do that? A. Yes sir.

Q. As a matter of fact, when you saw the man operating the dragline you told him to stop.

A. No sir, I didn't. [351]

Q. You told him that you wouldn't pay him.

(Testimony of S. M. Bauman.)

A. Yes, I told him when he got to a certain point the District was through.

Q. And when he got to this point (indicating) you told him not to clean any further.

A. No, we cleaned to the Great Northern right-of-way.

Q. You didn't clean out the rim ditch?

A. No sir.

Q. That rim ditch is necessary to keep the seepage water from coming to the main ditch?

A. I cannot tell much about this rim ditch.

Q. When did you go down to the rim ditch?

A. In the fall I was appointed. Down to the lateral going through to the Great Northern.

Q. Did you notice what work there had been done at that time? A. Yes sir.

Q. They had cleaned out the ditches.

A. They tried but the ditches didn't look like it.

Q. Did you notice the condition of the land as to whether the land was wet. A. It was boggy.

Q. Did you notice that they plowed that land the next year.

A. Not the land I am speaking about.

Q. Did you notice they plowed some of this land?

A. Part of the land in that area, but not this particular land, no. [352]

Q. Part of this land cleaned off in 1939 is now in cultivation.

A. I am not very familiar with that side of the ditch.

(Testimony of S. M. Bauman.)

Q. Why did you put in the record that this land wasn't worth cleaning out. You passed a resolution to that effect. A. Would you show me that.

Q. You passed the resolution shown on exhibit 3. This part here (indicating) it says "moved by S. M. Bauman and seconded by Roy Copeland, referring to Mr. Woldson's letter of May 10th, 1940, demanding that the commissioners of Drainage District Number One, immediately reditch the lands in parcel 1, 2, 3 and 4 owned by him, the same being located in the south end of district one, adjacent to the Great Northern right-of-way, consisting of swamp land", Mr. Woldson required you to reditch that and keep it cleaned out.

A. That's what that says.

Q. And it goes on "Whereas the Commissioners cleaned and deepened these ditches in November 1939, at a cost of about \$1500.00 same being paid only last week, and it is observed that this ditching has done very little good and the fact of Mr. Woldson insisting that it be done over again within six months, is further proof of its failure. Also during the past eighteen years the Commissioners have made repeated efforts on this land, ditching and cleaning ditches at the cost of several thousand dollars." You put that in there? [353]

A. I think we did.

Q. Did you go down to see if the ditches were doing any good there? A. We were there then.

(Testimony of S. M. Bauman.)

Q. Did you notice that they were cultivating any of the land. A. Yes sir.

Q. And it goes on "It is further stated that several owners of similar lands east and north of Mr. Woldson's land, along the Great Northern Right-of-way have never been able to reclaim or to crop their acres, but have never asked the Commissioners to ditch for them as they realized that it would cost more than the land was worth." You put that in there. A. It looks like it, yes.

Q. "In view of these facts the Commissioners are convinced that further reclamation in this or similar areas can not be accomplished except at prohibitive figures and further expenditures at this time would be a waste of money." That was your opinion. A. Yes sir.

Q. That is the position you took?

A. That was just the way we felt.

Q. And for that reason you would not do anything further toward reclaiming it would you?

A. That is a good reason. [354]

Q. That was the reason you wouldn't do anything further.

A. We didn't want to waste any more money.

Q. You wouldn't do anything further toward reclaiming it?

A. We didn't waste any more money there.

Q. All this land has been greatly improved over a period of years, and has been reclaimed.

A. Yes sir.

(Testimony of S. M. Bauman.)

Q. Only a few years ago the land referred to as Simon McDonald's was quite wet and swampy so it couldn't be cultivated?

A. I couldn't swear to that, it was before my time.

Q. You said that it appeared to be swampy but that in the fall you were there and part of it was drying up. What land did you refer to?

A. I don't get you.

Q. You testified that you were not over that part of the District in 1941 I believe, and you testified that it was swampy in 1939, but in the fall a part of it was drying up.

A. I think I made the statement that in 1939 I went over to the dragline and saw it was swampy.

Q. You said that in the fall part of it was drying up. I wondered what land you referred to?

A. Little spots. I didn't have any large area in mind, I didn't have reference to any large area.

Q. What did you refer to? [355]

A. To where that lateral is we cleaned out, from the main ditch to the Great Northern trestle.

Q. That was drying up?

A. There was spots you step on without miring.

Q. You say you never was in the southern end?

A. I said I was in certain part there from the subway over to where Oscar Davis goes up the hill there.

Q. You said that the surface water along the bank there drains into the District. A. It does.

(Testimony of S. M. Bauman.)

Q. This lateral is to catch the surface water that springs up on it.

A. Well, I am not familiar with it.

Q. If you are not familiar with it how do you know about the effect of that?

Judge Hunt: To which we object as being argumentative and not proper cross examination.

The Court: Yes, it is argumentative.

Q. Is there any place in the district besides the south end that it was necessary to put dragline laterals in? A. I cannot tell.

Q. Do you know of any? A. In the District.

Q. That is, is there any other part where the District put in dragline laterals leading from the main lateral. A. I cannot say that there was.

[356]

Q. As a matter of fact you know there isn't.

A. There is a lateral through the Simon McDonald land, I don't know how they were built.

Q. And you know that in your own land they put a lateral ditch and they had to use sheet piling?

A. Yes there is some.

Q. There is about two hundred feet.

A. About that.

Q. When was that put in? A. In 1928.

Q. That was when this work of reclaiming this land was going on?

A. I cannot answer that, but I know it was in 1928.

Q. Who put that sheet piling in, in 1928?

(Testimony of S. M. Bauman.)

Judge Hunt: Objected to as incompetent, irrelevant and immaterial.

The Court: He said the work is in there, let's get along.

Q. The District put that in?

A. That is what we call the main ditch.

Q. The District put that sheet piling in?

A. Yes, it is in the main ditch.

Mr. Whitla: That is all.

Judge Hunt: No further examination. At this time I renew the offer of defendant's exhibit 14.

The Court: What is it. [357]

Judge Hunt: Part of the minutes of the District, minutes of a meeting held on the 29th of October 1932, concerning the payment of \$500.00 over and above the \$1000.00 they agreed to pay Mr. Woldson for work done on the laterals in Mirror Lake.

Mr. Whitla: I object to this, it is incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: Just to show whether there was work in this District, just to lead up to the condition of the District when these men took office. Overruled.

Judge Hunt: There are attached to the pleadings, certified copies of petition in the matter of Drainage District Number One of Boundary County, it is sworn to on the 27th day of July 1932, the petition of Mr. Woldson, and there is attached to

(Testimony of S. M. Bauman.)

it a certified copy of response to the petition and certified copy of the Order signed by the District Judge dismissing the entire matter. I am a little in doubt as to whether I should ask that these be placed in evidence or be considered as being in evidence.

The Court: Can he use the copies attached to the pleadings.

Mr. Whitla: I have no objection to that. No, I don't make any objection on the ground of the [358] certification, we have agreed on that.

The Court: Now, what is the other objection you have.

Mr. Whitla: I object to this for the reason that it is incompetent, irrelevant and immaterial, and not admissible. It is *res judicata*, for any purpose, the petition showing that it was filed by the petitioner as owner of the bonds within the district, which bonds and interest were in default, and asking that the district proceed with its maintenance and clean out the ditches so that his bonds would be protected, there is a response to the petition and an order which order recites as follows: "Now at this time the Court being fully advised in the premises does hereby order and adjudge that the said petition be and the same is hereby denied and petitioner is hereby granted leave to at any time renew the said petition and application or to file a new petition for other and further relief in connection with the said decree or any matters therein

(Testimony of S. M. Bauman.)

covered." Our objection being that it shows upon its face that it was not decided upon its merits by the Court, that it was a matter where the question was reserved. It was a matter presented by Mr. Woldson as owner of \$112,500.00 of the bonds with \$4500.00 interest due, and we asked for a citation to require the Commissioners to keep this in good condition. [359]

The Court: I am going to reserve ruling on these.

Judge Hunt: We want to renew the offer of exhibits 27 and 28 it being the statements compiled from the records of the District concerning money spent on the laterals.

The Court: I gave that permission before I think. I was wondering if Mr. Whitla wanted to cross examine further on the exhibits.

Mr. Whitla: I would like to ask more questions on those.

The Court: We will recess until this evening. I think we will meet at 8 o'clock and try and close this up this evening.

8 P. M., November 22, 1941.

JOHN DAVIDSON

Recalled.

Cross Examination

By Mr. Whitla:

Q. When you were on the stand today you had a list that was headed Defendant's exhibit 27, and at the top it says "money spent on Woldson's laterals in 1933" and exhibit 28 says "Money spent on main ditch of drainage District No. 1" you said that those items shown there,—that the only way you could tell what it was spent for was by what appeared on the stubs of the [360] warrants?

A. That is correct.

Q. Taking the first warrant to Oliver Campbell, warrant 600 August 15, 1933, for maintenance work, that doesn't show where it was done.

A. That is correct.

Q. You have no other way of telling, except what appears on the stub of the warrant?

A. That's right.

Q. Now, Warrant number 614 dated November 24, 1933, Martin Woldson to pay for gas and rental of dragline, maintenance \$500.00.

A. That is correct.

Q. Number 608 shows October 16, 1933, gas, labor etc., for cleaning ditch in Mirror Lake, maintenance \$500.00.

A. That is correct.

Q. Is there anything to show that any of this

(Testimony of John Davidson.)

work was done on Woldson's lateral, exclusive of the main lateral from the booster pump.

A. Nothing except what the stubs show.

Q. This Mirror Lake Main ditch where does it begin and end?

A. We consider that at the Booster pump, across section 5, 4, 33 and across up in section 28, that is all the Mirror Lake main ditch.

Q. Then take the charge for Booster pump.

[361]

A. Most of them are on the Booster pump.

Q. None of this was spent on any laterals of Martin Woldson's outside of the main ditch.

Q. Nothing except what the stub shows.

Q. Number 700, April 2, 1935, S. Blankenship for services in 1934, four days moving dragline out from Mirror Lake, 1934 maintenance fund. That is what that was for.

A. Yes sir.

Q. For doing what it says, taking the dragline some place.

A. Yes sir.

Q. In 1937. Warrant number 783, dated December 11, 1937 to William Bennett, 75 hours at fifty cents, Booster pump, 1937 maintenance.

A. That was work on the booster pump cleaning out the grass or what it is called.

Q. Warrant number 808, Oscar Davis man and tractor working on matts 14 hours and moving matts for dragline 14 hours and some poles, that is on the 1938 maintenance. That is all that shows.

A. Yes sir.

(Testimony of John Davidson.)

Mr. Whitla: I object to it being introduced, it shows from the evidence that it is not for work on the Martin Woldson laterals, it is general work in the District and not a bit was on Woldson's laterals. It is misleading and an improper statement. You cannot simply have it labeled one thing and have it introduced [362] for that purpose.

Judge Hunt: I have this to say, this witness was asked by counsel to prepare for us a statement showing the money spent by the District, year by year upon the lateral south of the Booster pump and another showing the money spent on the Woldson laterals, and in response to that request he did prepare such a list from his record, a copy was given to counsel and now he comes in here and testifies,—if he tells us that he gave us a false list there isn't much we can do.

The Court: He says it shows what is on the stubs and he presented the original stubs. The question is whether these exhibits are material.

Judge Hunt: I think it is admissible and if they can rebut it that is another matter.

The Court: You understand when you put a witness on the stand to present an account of any record of a county or municipality for any such record then that is admissible, it is admissible after you tender to the other side the records upon which he may cross examine, simply so that they may have an opportunity to cross examine. Whether it is a private or a public record. When you tender

(Testimony of John Davidson.)

this statement he then has a right to cross examine from the record which must be produced. Now he shows from the stubs what these amounts represent and where the money was spent. [363] Now it is a question of what does this show. Do the stubs sustain this record. He is showing what the stubs show. Do you offer the stubs along with these two exhibits.

Judge Hunt: Yes we offer them. We ask that the stub books be marked and ask that they be admitted after being properly marked.

The Court: I will reserve ruling on these at the present, go ahead with this witness.

Redirect Examination

By Judge Hunt:

Q. You were asked to prepare a statement showing the moneys spent on the Woldson laterals or the Woldson land, and also one of the money spent on the ditches south of the booster pump.

A. Yes sir.

Q. Did you go through the record and prepare such a list?

A. Yes, I went through the stubs.

Q. Is the list which you hold in your hand, according to the best of your ability and knowledge as to where the money was spent, a list showing what it was spent for?

Mr. Whitla: I object to this as incompetent, irrelevant and immaterial, and improper redirect.

(Testimony of John Davidson.)

The Court: I want to get the facts, I will ask him what do they show.

A. Look at the first item of \$485.00, it don't show that [364] was spent in Mirror Lake.

Q. Why did you put it on there?

A. Because we were working in that part of the country at that time.

Q. Was it actually spent in Mirror Lake?

A. I didn't put in on the stub.

Judge Hunt: We are helpless if this officer of the District gives us a statement that is not true and we are not informed until he gets on the stand here and says now that he didn't put it on the stub. Our point here is that it goes to the weight of this testimony.

The Court: But you are asking me to receive these two statements in evidence.

Mr. Whitla: And I challenge every item, there is not a single stub that shows that any of this work was done on Martin Woldson's lateral exclusively.

The Court: It is agreed that the defendants offered this statement for the purpose of showing that it was spent on the plaintiff's land?

Judge Hunt: Yes, we have offered the statements and now offer the original stubs, I would have to go through and read the stubs.

The Court: Unless this witness can testify from his personal knowledge. [365]

(Testimony of John Davidson.)

Mr. Whitla: But Your Honor, the witness has been interrogated by them and by myself.

The Court: But there is still some doubt about the exhibits.

Q. I will ask you if from your independent knowledge of the facts relative to the expenditures known to you as Commissioner of that District and Secretary of the Board, will you state whether or not from your independent recollection of the facts, whether the facts as stated in exhibits 27 and 28 are true or not.

Mr. Whitla: I object to the question as calling for a conclusion and leading, and incompetent, irrelevant and immaterial.

The Court: I want to get at the bottom of this. He may answer.

Q. Is that statement true according to your independent recollection of what was done.

A. I would not go beyond my showing on the stubs.

Q. Do you know of your independent recollection whether that accurately reflects the condition.

A. The condition on the stubs.

Q. Do the record on the stubs correctly reflect all the money spent on the laterals of Mr. Woldson and the main lateral south of the booster pump. Do they reflect what money was expended there.

A. It does, yes. [366]

The Court: Where was the money spent.

A. It shows on the stub.

(Testimony of John Davidson.)

Mr. Whitla: Is there a single thing on the stubs to show that any was spent on Martin Woldson's laterals exclusive of the main lateral.

A. No there is not. There is some in Mirror Lake.

The Court: If the Plaintiff's lands are in Mirror Lake, now you will have to clear that up. Maybe I can clear it up.

The Court: Mr. Witness, you are holding in your hand exhibits 27 and 28.

A. Yes, that is correct.

The Court: Taking exhibit 27, did you make that?

A. I made it up first, the first part, but I presume that Mr. Wilson typed it.

The Court: Did you check it.

A. I did this afternoon.

The Court: From your checking does that correctly state what is on the stubs?

A. Yes sir.

The Court: Is that the same situation with respect to exhibit 28.

A. Yes sir.

The Court: Now, do you think the stubs reflect where this money was spent. [367]

A. It doesn't state, outside it says labor or work on the main ditch.

The Court: Now do you know from your independent recollection where this money was spent.

A. It was in the main ditch.

(Testimony of John Davidson.)

The Court: As reflected in both exhibits.

A. Exhibit 27, that was in the Mirror Lake lateral, in the Mirror Lake district.

Q. Does that district cover the plaintiff's land?

A. It does.

The Court: Do you know that money was spent there.

A. That is my only evidence. It is hard for me to remember back seven or eight years.

The Court: The stubs do state that money was spent in the main laterals in that part of the District where the plaintiff's land is.

A. Yes sir.

The Court: That is exhibit 27.

A. Yes sir.

The Court: How about exhibit 28.

A. That states the main ditch.

The Court: Where is that.

A. Part of the main ditch includes the Mirror Lake section.

The Court: Part of it.

A. Yes sir. [368]

The Court: Could you tell what part.

A. From here down here (indicating).

The Court: Can you give some section or quarter section.

A. From the outlet, the outlet of the main ditch. From some place in here, I think section 30.

(Testimony of John Davidson.)

The Court: Part of this shown on exhibit 28 was spent in that main ditch.

A. Yes sir.

The Court: Is that main ditch used in connection with draining plaintiff's land?

A. Yes sir.

The Court: How much of that exhibit 28 was spent in that part of the main ditch.

A. I cannot tell.

Mr. Wilson: Witness prepared at my request all south of the Booster pump in the main ditch.

The Court: From the testimony of the witness now, exhibit 27 is admissible and the stubs. Now, as to exhibit 28 it is reflected that part of that is spent in the main ditch used in draining the land of the plaintiff but he doesn't say what part. If we could show what part. Of course, he is testifying from his independent recollection. I cannot allow that in at this time.

A. Part of the ditch is not in Mirror Lake, and part of [369] it runs through Mirror Lake.

The Court: What part of the ditch runs through Mirror Lake.

A. That is the middle part of the ditch.

The Court: Can you tell from the exhibits how much was spent on that part?

A. No sir, I cannot.

The Court: That is what I am trying to find out.

A. It would be impossible for me from these stubs to tell where it was all spent.

(Testimony of John Davidson.)

Judge Hunt: I will not pursue it further. I will simply repeat that we asked the witness to prepare this and if we got false information,—

The Court: —He has told about 27, and he is testifying from memory as to 28 now.

Q. You were asked to get the information as to the amount of money spent on the main ditch south of the booster pump. A. Yes, I was.

Q. In pursuance of that request you got certain information and gave it to Mr. Wilson as being the money spent south of the Booster pump.

A. That is correct.

Judge Hunt: That is all.

Recross Examination [370]

By Mr. Whitla:

Q. This warrant number 600 to Oliver Campbell, do you have any knowledge of where that was used? A. No sir, I haven't.

Q. This next, Martin Woldson, gas, labor, cleaning ditches, do you have any information and to where that money was used, other than what is on the stubs?

Judge Hunt: We object to this, it has been gone over item by item.

The Court: Yes, it was gone over. These items, where was this money shown on exhibit 27 spent?

A. These two items Martin Woldson, that was in Mirror Lake.

(Testimony of John Davidson.)

The Court: How was the rest of it in exhibit 27 spent?

A. In the year 1933, them items and in 1935 that item of \$32.00, that was removing the dragline out of Mirror Lake.

The Court: And the two items of \$500.00 each they were in Mirror Lake.

A. Yes sir. The only record I have is the stubs.

The Court: As to these items you know there were spent there.

A. Yes.

The Court: Now he says the only information he has is on the stubs, he confined his testimony to that and not any recollection. I realize it is hard [371] for him to remember where the money was spent in the district. He is not subject to any criticism on that.

Judge Hunt: That is why we asked him to get the record for us and he did that, and now he comes in and says the stubs don't show where the money was spent and that is all he depends on.

The Court: I will ask you once more. Is it your testimony that you gathered this information from the stubs of the District which you offered here.

A. That is correct.

The Court: Have you any independent recollection other than the stubs where this money was spent.

A. No, I haven't.

(Testimony of John Davidson.)

The Court: His statement now doesn't show where this was spent. When I questioned him before he said some was spent in this Mirror Lake area where the Plaintiff's land was located now, he said he gets his information from the stubs of the warrants. I will sustain the objection, the proper proof has not been made to allow these exhibits in evidence.

Q. I hand you exhibit 35, is this signed by yourself Mr. Bauman and Mr. Copeland. Did you sent that notice to Mr. Woldson? A. I did.

Q. All of the Commissioners signed that? [372]

A. Yes sir.

Judge Hunt: We have no objection to the exhibit going in.

The Court: Then it may be admitted.

PLAINTIFF'S EXHIBIT No. 35

Admitted Nov. 22, 1941.

Bonnors Ferry, Idaho

July 7, 1940

On our inspection of the ditches this morning it was found necessary to clean out two slides in the main ditch a short distance from the south east corner in the ditch west from the corner.

It was agreed by the com. that we hire Mr. Woldson's dragline to do the work. That machine is now working in Mirror Lake. The Drainage Dist.

(Testimony of John Davidson.)

no. 1 will pay all expences in connection with cleaning out the two slides in the main ditch.

not to *excede* 2 - 8 hour days.

S. M. BAUMAN

JOHN DAVIDSON

ROY COPELAND. [449]

Q. Mr. Davidson, something was said about some additional booster pump being put in this district recently and some electric power or current furnished to pump water.

Judge Hunt: We object to this, it is a part of the Plaintiff's case and not proper cross examination.

The Court: I will allow it in, we will save time.

Q. Something was said about new booster pumps and electric current furnished for them to pump water out of the district during the fall and winter season. Who furnished that current. Who pays for it.

A. The village of Bonners Ferry furnishes it.

Mr. Whitla: I will make him my witness in rebuttal now, and for the purpose of the last question.

The Court: Very well.

Q. Who pays for the power to pump the water.

A. The Kootenai Power and Light Company.

Q. The Western Kootenai Power Company from Canada.

A. Yes sir.

(Testimony of John Davidson.)

Q. Why?

A. Well, because they are the ones that hold the water up [373] high.

Q. Does that apply to all the power used to pump water out of that lake? A. Yes sir.

Q. What did the Western Kootenai Power Company do toward paying for these pumps being installed?

A. They paid one-half of the expense of installing, and one-half of the labor.

Q. That was also because they are backing the water up in the Kootenai river?

Judge Hunt: Objected to as leading.

The Court: Sustained.

Q. State *why* they make this payment.

A. They are making the payment because they are the cause of our pumping.

Q. Who was it that took up the matter of objecting to the Western Kootenai Power Company that unless they made some adjustment to this district—

Judge Hunt: We object to that as not proper rebuttal.

The Court: Overruled.

Q. Who was it that took this adjustment up.

A. Well, it came up this way, they were holding the water up so high in the River so that we could not use our natural outlet, and any pumping expense they agreed to pay for. [374]

Q. What did Martin Woldson have to do relative to getting this adjustment?

(Testimony of John Davidson.)

Judge Hunt: We object to this as hearsay.

Q. If you know of your own knowledge.

A. The reason is that our District is the lowest district in the valley and most severely affected by the high water, that is why they are paying for the expense of keeping the water out of the District for the winter months.

Judge Hunt: Is that what you know of your own knowledge.

A. Yes sir.

Q. Who made the protest of their backing this water up?

Judge Hunt: That would be hearsay, we object.

Q. They had a hearing on this protest in Bonners Ferry.

A. Mr. Whitla and Mr. Woldson was at that hearing and I was at the hearing myself.

Q. Did this adjustment grow out of that hearing?

A. Yes sir.

Mr. Whitla: That is all.

Recross Examination

By Judge Hunt:

Q. Where do you get that power.

A. Bonners Ferry.

Q. Who pays the bill to the Village of Bonners Ferry.

A. The District is paying it at the present time, during [375] the time when the water is held up in the spring we are sending a statement to the

(Testimony of John Davidson.)

Kootenai Power and Light Company and they send the money.

Q. Then the Western Kootenai Power Company does not pay the power bill.

Mr. Whitla: We make the objection that it is argumentative.

The Court: No, he asked do they pay the bill.

Q. How often do you get the power bill?

A. Once a month.

Q. Do you issue a warrant.

A. Issue warrant each month.

Q. Do you issue it to the Village of Bonners Ferry for the Power bill? A. Yes sir.

Q. And you get a refund from the Western Kootenai Power Company for a part of the pumping.

A. We get a refund from Bonners Ferry if we pay the bill within a certain time.

Q. You have a separate meter don't you for the pumping? A. Yes sir.

Q. You get no refund from anybody?

A. On the bill we do.

Q. You have a separate bill for the power at the Booster pump.

A. Not a separate bill. It is the same bill but a separate [376] item.

Q. Did you ever get a refund or anything else for power used in operating the booster pump?

A. We get a ten per cent discount if it is paid by the 10th of the month.

(Testimony of John Davidson.)

Q. Everybody gets that. A. Yes.

Q. Other than that do you get any refund?

A. No sir.

Q. The only refund you get is at the outlet.

A. The two pumps on the same bill.

Q. But segregated as separate items.

A. Yes sir.

Q. You have a motor at the outlet.

A. Yes sir.

Q. How much rebate do you get for the bill using power at the outlet. A. I cannot say.

Q. Can you fix it in a percentage?

A. Ten per cent.

Q. That is the only rebate you get.

A. Yes sir.

Judge Hunt: Very well, that is all.

Redirect Examination

By Mr. Whitla:

Q. The city gives a rebate of ten per cent. [377]

A. Yes sir.

Q. Does that have anything to do with the Western Kootenai paying this bill in the Spring for the Winter pumping. A. I think not.

Q. What do you do relative to sending this bill?

A. Get this bill together and making an itemized statement we get the money, that is what is spent for power.

Mr. Whitla: That is all.

(Testimony of John Davidson.)

Recross Examination

By Judge Hunt.

Q. You mean that you don't pay any power bill to anyone for power?

A. Not in the winter months.

Q. In the winter months there is a refund.

A. Yes sir.

Q. What about the power in the summer?

A. We get ten per cent rebate.

Q. No rebate from the Village of Bonners Ferry to the Western Kootenai Power Co.

A. The bills in the winter are the same as in the summer.

Q. Does the Western Kootenai Power Company give your Company or District a rebate of the power used in the summer.

A. No.

Q. What does the Western Kootenai Power Company give back for the power used in the winter time?

A. What we are actually out. [378]

Q. At the outlet pump?

A. Both pumps, what the bills call for.

Q. I want to clear this up if I can. Isn't it a fact that the drainage district itself pays for the entire pumping bill in the summer months?

A. That is correct.

Q. In the winter months the Western Kootenai Power Company makes good for the bill you incur in pumping in the winter?

A. That's correct.

Judge Hunt: That is all.

Mr. Whitla: That is our case.

The Court: Both sides rest.

Judge Hunt: That is right.

Mr. Whitla: Yes, we rest.

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the Court reporter who took the proceedings and testimony in the foregoing cause in shorthand, and thereafter transcribed the same into longhand, and I further certify that the foregoing transcript consisting of pages 1 to 302 exclusive of this certificate contains all the evidence given and the proceedings had in and about the trial of said cause, and that the same is a true and correct transcript of said testimony and proceedings.

In Witness Whereof I have hereunto set my hand this 7th day of March 1942.

G. C. VAUGHAN,
Reporter.

[Endorsed]: Filed April 9, 1942.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents that Martin Woldson, as principal and the Aetna Casualty & Surety Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Connecticut, and duly authorized to do business in the State of Idaho and to act as such on any and all undertakings in the Federal Court of the United States, as surety, acknowledge ourselves to be jointly indebted to S. M. Bauman, Roy Copeland and the National Surety Company Appellees in the above cause, in the sum of Two Hundred Fifty (\$250.00) Dollars, conditioned that whereas on the 13th day of January, 1942 in the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in that Court wherein the said Martin Woldson was plaintiff and the said S. M. Bauman, Roy Copeland and the National Surety Company were defendants, known in the civil docket as No. 1488, a judgment was rendered against the said Martin Woldson as plaintiff and the said Martin Woldson having filed in the office of the Clerk of the District Court, a motion on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California.

Now, the conditions of the above obligation is such that [381] if the said Martin Woldson shall prosecute his appeal to effect and answer all costs if the

appeal is dismissed, or the judgment affirmed, or such costs as the Appellant Court may award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

MARTIN WOLDSON

Principal

(Seal)

AETNA CASUALTY & SURE-
TY COMPANY a corporation

By OSCAR W. NELSON

By A. L. GRIDLEY

Attorneys in Fact

Approved this day of April, A. D. 1942.

.....
District Judge.

[Endorsed]: Filed Apr. 8, 1942. [382]

[Title of District Court and Cause.]

PETITION

Now comes Martin Woldson, the appellant in the above entitled action and respectfully states and shows to this Honorable Court that there has been introduced evidence in this case as Exhibits 11 and 24, consisting of maps which can not be properly printed so as to correctly show and designate the contents thereof or so that the appellant Court may properly have said matter before it, and your petitioner therefore prays an order of this Court directing that the original of said maps, exhibits 11 and

24, be by the Clerk of this Court transported to the Circuit Court of Appeals to be used by them upon the hearing of this case and that said exhibits may be transported by mail in the ordinary method of furnishing papers to said Court.

EZRA R. WHITLA

E. T. KNUDSON

Attorneys for Martin Woldson,
Appellant
Res. & P. O. Add. Coeur d'Alene,
Idaho

[Endorsed]: Filed April 8, 1942. [383]

[Title of District Court and Cause.]

ORDER

In this matter upon considering the petition of Martin Woldson to send to the Circuit Court of Appeals as part of the record on appeal in this matter original papers consisting of maps introduced in evidence as Exhibits 11 and 24 and it appearing that it is proper so to do:

It Is Ordered that the Clerk of this Court forward said maps with the record on appeal in this case by United States mail the same as other records are submitted to said Circuit Court of Appeals to be by them kept until said cause is determined and then returned as provided by law.

Dated this 8th day of April, A. D. 1942.

CHARLES C. CAVANAH

Judge.

[Endorsed]: Filed April 8, 1942. [384]

[Title of District Court and Cause.]

PETITION FOR ADDITIONAL ORIGINAL
EXHIBITS TO BE FURNISHED APPEL-
LANT COURT

Now comes Martin Woldson, the appellant by Ezra R. Whitla and E. T. Knudson, and respectfully petitions that additional original exhibits in addition to those which this Court has heretofore directed be furnished to the Circuit Court of Appeals in lieu of trying to include the same in the record being furnished, to wit:

Exhibit No. 19 which comprises a large amount of tax receipts and which it would be hard to be printed to be intelligent to the Circuit Court of Appeals.

Exhibit No. 25 which is a voluminous specification and general instructions to bidders which it would be very hard to have printed so that the same would be intelligent to the Circuit Court of Appeals and affiant is informed by the Clerk of this Court that it would be much better to have said exhibits sent up as original exhibits and in your petitioner's opinion the same should be inspected by appellant court.

Exhibit No. 18 is a large amount of tax deeds and which it would be hard to be printed to be intelligent to the Circuit Court of Appeals.

Your petitioner prays that an order may be made herein directing the said original exhibits be forwarded to the Circuit Court of Appeals.

Dated this 28th day of April, A. D. 1942.

EZRA R. WHITLA

E. T. KNUDSON

Attorneys for Martin Woldson,
Res. & P. O. Add. Coeur
d'Alene, Idaho.

[Endorsed]: Filed April 30, 1942. [385]

[Title of District Court and Cause.]

ORDER

The Clerk is Ordered and Directed that original exhibits 18, 19 and 25 in the above cause are to be transported to the Circuit Court of Appeals for inspection.

Dated April 30, 1942.

CHARLES C. CAVANAH

District Judge.

[Endorsed]: Filed April 30, 1942. [386]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To W. D. McReynolds, Clerk United States District
Court for the District of Idaho, Northern Division:

You will please prepare a transcript on Appeal herein including therein the following papers:

1. Complaint filed March 6, 1941.
2. Answer to complaint filed May, 1941.
3. Opinion filed January 5, 1942.
4. Findings of Fact and Conclusions of Law filed Jan. 13, 1942.
5. Judgment to include the complete judgment roll filed Jan. 13, 1942.
6. Objection to the proposed Findings of Fact and Conclusions of Law filed Jan., 1942.
7. Statement of points upon which appellant intends to rely as assignments of error filed April 8, 1942.
8. Petition for allowance of appeal filed April 8, 1942.
9. Order allowing appeal and fixing bond filed Apr. 8, 1942.
10. Notice of appeal filed April 8, 1942.
11. Complete transcript of the evidence.
12. Petition to furnish the Circuit Court of Appeals with original exhibits 11 and 24, being the maps in evidence filed April 8, 1942.

13. Order providing for furnishing the original exhibits 11 and 24 filed April 8, 1942.

14. All exhibits introduced and received in evidence, including exhibits 20 and 21 being exhibits 1 to 35 inclusive. [450]

15. Copy of this designation of contents of the record on appeal.

16. Certificate of Clerk to the Transcript.

EZRA R. WHITLA

E. T. KNUDSON

Attorneys for Appellant, Res. &
P. O. Add. Coeur d'Alene,
Idaho.

[Endorsed]: Filed April 8, 1942. [451]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD

United States of America,
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 451, inclusive, to be a full, true and correct copy of so much of the records, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United

States Circuit Court of Appeals for the Ninth Circuit in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I Further Certify That the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$77.10, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 30th day of April, 1942.

(Seal)

W. D. McREYNOLDS
Clerk.

[Endorsed]: No. 10128. United States Circuit Court of Appeals for the Ninth Circuit. Martin Woldson, Appellant, vs. S. M. Bauman, Roy Copeland and The National Surety Company, a corporation of the State of New York, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Northern Division.

Filed May 4, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10128

MARTIN WOLDSON

Plaintiff,

vs.

S. M. BAUMAN, ROY COPELAND and THE
NATIONAL SURETY COMPANY, a corpora-
tion of the State of New York,

Defendants.

NOTICE OF ADOPTION

The Appellant herein adopts as his points on appeal the statement of points appearing in the transcript of the record and desires that the record be printed in its entirety.

Dated this 9th day of May, A. D. 1942.

EZRA R. WHITLA

E. T. KNUDSON

Attorneys for Plaintiff, Res. &
P. O. Add. Coeur d'Alene,
Idaho

[Endorsed]: Filed May 11, 1942. Paul P.
O'Brien, Clerk.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARTIN WOLDSON,

Appellant,

vs.

S. M. BAUMAN, ROY COPE-
LAND and THE NATIONAL
SURETY COMPANY, a corpora-
tion of the State of New York,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court,
For the District of Idaho, Northern Division.
HON. CHARLES C. CAVANAUGH, District Judge

EZRA R. WHITLA

E. T. KNUDSON

Coeur d'Alene, Idaho,

Attorneys for Appellant.

FILED

JUL 14 1942

PAUL P. O'BRIEN,

CLERK

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARTIN WOLDSON,	}
Appellant,	
vs.	
S. M. BAUMAN, ROY COPE-	
LAND and THE NATIONAL	}
SURETY COMPANY, a corpora-	
tion of the State of New York,	
Appellees.	

BRIEF OF APPELLANT

Upon Appeal from the United States District Court,
For the District of Idaho, Northern Division.
HON. CHARLES C. CAVANAH, District Judge

EZRA R. WHITLA
E. T. KNUDSON

Coeur d'Alene, Idaho,
Attorneys for Appellant

SUMMARY OF CONTENTS OF RECORD

General Statement of the case and pleadings
Pages 2 to 17.

Statement of the Evidence, pages 17 to 33.

Statement of Assignment of Errors and group thereof, pages 33 to 36.

Summary of Assignment of Errors, 9 to 13 incl., grouped under the heading that the court has failed to make findings on the issue involved and that the findings made are by conclusions of law. The argument on this covers pages 36 to 42.

Assignment of Error No. 2, covering the point that the laws and the decisions of the Idaho courts require the District Commissioners to drain the land and keep the ditches cleaned out and that this is mandatory and that the commissioners have only such duties as are conferred upon them by law and that 3 judgments of the District Court had ordered this done. The question is therefore res judicata and binding on this court, pages 42 to 54.

Assignments of Errors 3 to 7, incl., undisputed evidence shows that the commissioners refused to do their mandatory duty required by three judgments in the court; Woldson and his predecessors paid all maintenance assessments against the land and were entitled to have ditches cleaned out and the defendants who fail to do their statutory duty as adjudged by the Idaho Court become liable when they fail and neglect to perform this duty, pages 54 to 64.

Assignment of Error No. 14, the court erred in failing to find on the questions as to whether or not the commissioners did or did not fail to perform their duties and there being no discretion in the commissioners but

their duty being mandatory and ministerial, commissioners bound to keep ditches open and drain the land, and cannot substitute their judgment of the law and the orders of the court, pages 64 to 76.

AUTHORITIES

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Amy v Barkholder, 11 Wallace 136; 20 L. ed.
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Booth v Groves et al, 43 Ida. 703; 255 Pac. 637

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Sec. 41-2501 to 41-2609, incl. I. C. A.

Sec. 41-2522 I. C. A.

Sec. 41-2539 I. C. A.

Sec. 41-2543 I. C. A.

Johnson v Young, 55 Ida. 271

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803

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Third Edition, P. 17

Packer v Whittier, 91 Fed. 511

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Adams, 45 N. E. 266

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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARTIN WOLDSON,	}
Appellant,	
vs.	
S. M. BAUMAN, ROY COPE-	
LAND and THE NATIONAL	}
SURETY COMPANY, a corpora-	
tion of the State of New York,	
Appellees.	

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an action prosecuted by the plaintiff Martin Woldson against the defendants and their surety for failure and refusal to perform their duty as commissioners of Drainage District No. 1 of Bonner County, Idaho.

Situated in Boundary County, Idaho, adjoining the Kootenai River, was a large tract of swamp land, overflowed annually by the Kootenai River, and which the owners were desirous of forming into a drainage district, to dike and drain the same in order that it might be made suitable to produce a large amount of crops. Such proceedings were taken under the laws of the State of Idaho that on the 21st day of October, 1920, a decree was duly entered, organizing the drainage district, and the decree appears set out in full on pages 22 to 25 of the record. Thereafter the parties duly appointed to report the benefits and damage did so and the district was thereupon organized.

A portion of said District was lower than the balance, which the parties knew would take more time to dry out and drain, so the levy of assessments against it was deferred. Thereafter the commissioners made a report of a supplemental levy to include this land, which they

claimed had been drained, to which the former owners of the land in controversy made objection.

A stipulation was made between the parties that the commissioners of the district would within a reasonable time clean out, deepen and improve the drainage ditch so as to suitably and effectively drain this land, and that there might be entered in the order confirming the assessment roll such a provision, Plaintiff's Exhibit 17, page 213.)

Upon that stipulation being made, the decree was entered confirming this assessment, which decree set a flat rate of \$47.5016 assessment against each and every acre of land in the district, to pay for the construction, which was to include the cleaning out and deepening of these ditches. The decree is lengthy and appears on pages 215 to 255 of the record. By this decree a lien was established upon the land for this assessment, p. 245, where it was ordered as follows:

“It is further Ordered, Adjudged and Decreed that the Assessment roll filed by the Commissioners be and the same is hereby confirmed and approved as an additional assessment, and the lien against each subdivision, parcel lot or tract of land within said drainage district for the cost of said improvement is hereby declared and established as follows, to-wit:

Then the complete assessment in the Mirror or Sproll's Lake area, which is the area in controversy in this suit, showing the lien against this land for that sum.

The court found that upon this work being done it would benefit the lands to the extent of \$150.00 per acre, p. 251.

Upon the stipulation of the parties, and as a concluding paragraph of that decree, the court adjudged and decreed as follows:

“It is further ordered, adjudged and decreed that the Commissioners of Drainage District No. 1 of Boundary County, Idaho, within a reasonable time, clean out, deepen and improve the present drainage ditch so as to suitably and effectively drain the land of objectors, to-wit: (Then follows a description of the land.)”

This was the first court order to do the work now complained of and a final judgment that this work should be done. This decree was dated August 20, 1924, but the decree was not complied with, and thereupon, in December of 1924, the parties who had objected, filed a petition for an order to show cause to set aside that supplemental assessment because the land had not been drained. This appears as Plaintiff's Exhibit 17, pages 208 to 213, inclusive.

The commissioners filed an answer to this petition, which appears on pp. 197 to 200, inclusive. This answer admitted that the land was not drained because obstructions had been formed in

the drainage ditch, and that the commissioners had had a disinterested engineer to make a survey, and that said engineer,—

“Has made a survey of the land within said District and has made a report to the Commissioners setting forth *that the only work* required to be done in order to completely drain the land of the objectors is that the entire ditch, from its outlet throughout its entire length, be cleaned out and the obstructions removed, so that the original grade of said ditch at the time the same was finally completed be restored.”

The Commissioners then alleged that this would be done and that when it was done the land would be suitably drained and that it was a necessary expense to be borne by the entire District. (P. 199.)

Upon this Answer being filed, a stipulation was then entered into which appears on pages 194 to 197. In that stipulation both the officers and the owners of the lands stipulated that the lands had been drained, but were entitled to be suitably drained for agricultural purposes by virtue of the charges and assessments imposed upon said lands for that purpose. (P. 195, Par. 2.)

It was also stipulated that the land owners were entitled to an order directing the commissioners to clean out and maintain the said ditch to the original level thereof and to construct such

laterals as may be required, etc. (Par. 5, p. 196.) and that the maintenance and repair would be a proper item to be charged to the whole district. (Par. 6, p. 196.)

Upon this stipulation and answer the case was heard and decided by the court. Findings, conclusions and decree were entered therein. The findings were in part as follows:

“That the lands of the above named objectors would be drained if the main drainage ditch of said District had not been obstructed by the caving of banks so that the same is not as deep as originally constructed and as called for by the plans and specifications of said ditch, * * *

(Par. 2, p. 203.) And it was further found:

“That if the original grade of the said ditch be restored from its outlet throughout its entire length, and several laterals were dug as recommended by the engineer, * * * the lands of the objectors would be drained sufficiently for agricultural purposes.”

(Par. 3, p. 203)

The conclusions of law then were that upon these findings and the stipulation an order should be entered requiring the commissioners to clean out this ditch and that it was a proper maintenance.

Thereupon an order and degree was entered, page 205 to 207, which required the commissioners as follows:

“Be and they are hereby instructed to forthwith, at the expense of said District and as an item of maintenance chargeable to the entire district, proceed to clean out said ditch to the original level thereof *and maintain said ditch to said original level*, construct such laterals as may be required, * * *.”

It was also decreed that the cost of doing this was a proper item to be charged to the entire district, and that such would be done.

This was the second order requiring this work to be done.

However, this was not done and thereafter the owners of this land again brought proceedings to require this work done. The commissioners came in and made a showing that in addition to draining this land they should do a lot of other work to make the entire system effective. A hearing was had upon that and again the court made another order in the matter, which appears as Exhibit “D”, p. 31 to 38 inclusive, in which the court recited some of the former proceedings and again decided.

“And it further appearing that the above mentioned order of the court has not been complied with by the Commissioners in the office at the time said order was made or by the Commissioners that have since been in office.” and the court again ordered the commissioners as follows:

“To deepen and clean out the ditches now

constructed in said Drainage District to such depth as may be necessary and to construct such other ditches within said Drainage District as may be necessary to sufficiently drain all the land within said Drainage District suitable for agricultural purposes.”

The court then approved a further charge against all the land in the district of \$23,000.00 to build new outlets, put in pumps, etc. This was the third court order requiring this work to be done.

Under the last order the commissioners did proceed to do some work and spent the entire \$23,000.00 mostly *at the outlet*, for the benefit of the entire district, placing a large amount of pipe, changing the outlet altogether, etc. They did not, however, clean out and keep cleaned out the ditches which were provided for by the original plans and specifications under which the assessment was made, through, along and over the lands of the plaintiff, although ordered to do so by three orders of the court.

Mr. Woldson became the owner of this land in 1932. Thereafter the commissioners agreed with him that they would not levy any more assessments against his land until they did drain the same. They did not follow this agreement, but continued to levy maintenance charges against the land in controversy, although never draining the same. The main lateral ran through part of Mr. Woldson's land, which is referred to

generally as the Mirror or Sproll's Lake area, and extended several miles beyond it. Beyond Mr. Woldson's land there was another small, shallow lake called Mud Lake. Bauman and Copeland, the present commissioners, lived above and beyond Woldson's land. This same drainage ditch drained their land. Their land was considerably higher than Woldson's and the water from the high land and from Mud Lake was drained down into the lower portion of Mirror Lake area. If the ditches were not kept clean it remained there and flooded Woldson's land. If the ditches were cleaned out, and kept cleaned out, it would drain off so that the water would be about four feet or more below the surface of Woldson's land and it could therefore be cultivated.

As the commissioners proceeded to assess Woldson's land from year to year for maintenance taxes and did not maintain or drain the land, or keep the ditches cleaned out so that the water would drain off, he made demand upon them that they do so. Exhibit ----. The commissioners flatly refused to keep the ditches cleaned out, making various statements to him, namely, that others who had owned the land had lost it and he could do the same; also that his land was not worth draining, and also when they did do some work they made it clear that it was useless and of no effect.

Originally there was between two and three hundred acres of Woldson's land not drained. Whenever the ditch would be cleaned out water would drain off and more of the land would be put under cultivation. The land had been a slough or very shallow lake bottom and originally was very soft. There were hills around the land so that the water from the hills would seep down and come up all over the entire district, causing what is sometimes referred to as "springs". Along the foot of the hill a ditch was originally built. This was provided for by the original plans and specifications of the district, and is referred to as the "Rim Ditch". It was dug so that if it was cleaned out, and kept cleaned out, it would intercept the flow of the water down into the drainage district, carry it off into the lateral below most of Mr. Woldson's land. This lateral likewise was not cleaned out and the commissioners refused to clean it. One year the commissioners did some work along the main lateral ditch but did not clean it all out.

Mr. Woldson proceeded to do the balance of this particular work and *the result was that he was able to put under cultivation ninety acres more of the land.*

When the commissioners put on record a refusal to clean out the ditches and do the work, Mr. Woldson brought this action against them

to recover his damages therefor. One commissioner, John Davidson, refused to approve their action and voted against the same, so he was not made a party to the proceedings.

The complaint alleges the fact of the organization, diversity of citizenship, the filing of the assessment roll against this land, and that in the Mirror or Sproll's Lake area the assessment was \$33,005.38, with a supplemental assessment of \$6,460.05, and in the Frye Lake area the original assessment was \$13,994.46, with an additional assessment of \$15,332.50. Also that the number of lots had been changed by a resurvey effected by the district for the purpose of the assessment, but that the land of the plaintiff was exactly the same land as originally assessed.

The original order in the proceedings, to clean out, deepen and improve the ditches so as to effectively drain the land, was alleged in the complaint. The subsequent proceedings, where the various other orders were afterwards made against the commissioners, were also alleged. (Par. 5, p. 7.) These original proceedings were attached to the complaint as a part thereof. The decree of 1928 was also alleged. (Par. 6, pp. 8 and 9).

It was then alleged that a portion of the land was drained but that the balance was not, and that these two commissioners refused to do any

more work; that they notified the workmen who had been employed to do this work, to quit and that they would not get any money if they went ahead with the work, and that Bauman in every way tried to stop the cleaning out of these ditches. (Par. 11, page 12).

Mr. Woldson, in the early part of 1940, made application to the commissioners to clean out the ditches. At no time did Mr. Woldson ask for any change of the original plans or specifications. *All Mr. Woldson wanted or ever demanded was that the ditches be cleaned out as originally provided for.* When the commissioners advised that they would not clean out the ditches, Mr. Woldson notified them that if they would not do so he would and charge the same to the district. In 1940, at an expense of \$1502.41, he did enough work so that ninety acres of land was reclaimed.

The commissioners imposed maintenance taxes on the land not drained in the sum of \$1477.97. Had they drained it when it was requested Mr. Woldson would have had the entire 221.86 acres which was worth \$10.00 per acre for its use, cropped, and he lost that much because of the refusal of the commissioners to drain said land, in addition to having lost the taxes on it. He also was put to the additional expense of \$1502.41 for cleaning out the ditches so he could use one hundred acres.

During all of this time, although this land was never drained, the district had assessed and collected \$4080.00 for maintenance purposes alone. The total amount of damage which plaintiff alleged against the defendants was \$7049.93 and asks for judgment against them in that amount. A very remarkable answer was filed in the case, admitting part of the allegations and denying others, among other things alleging that Mr. Woldson was at one time the owner of some of the bonds of the district and as a bond holder had asked the court to order all the maintenance work done in the entire district. The court at that time refused to do so, reserving to him the right at any time to renew the motion. They then alleged that they put on record minutes stating that the plaintiff's land was not worth the cost of draining the same at the expense of the district, and that plaintiff's land could not be successfully drained, and that they would not spend any more money draining it. (Pages 42 and 43).

The commissioners admitted they told Mr. Woldson they would not clean out the ditches, page 42, the answer being:

“Admit that they notified the plaintiff that they would not proceed with the draining of land and that they would not further clean out ditches on the land of the plaintiff, etc.”

They admit that they had assessed and collected \$4080.00 for maintenance purposes from this land and that it has not been drained so that it could be cultivated. They then set forth that certain land above plaintiff's land was higher than plaintiff's land and that the draining of the water off plaintiff's lands had made an exceptionally dry condition in the adjoining land; that said dry condition has lowered the water in the land adjoining the lands claimed to be owned by plaintiff to a depth of *sixteen feet below the* ground level of said lands, resulting in an exceptionally dry condition of said adjoining lands; that the adjoining lands are higher than plaintiff's land and that the natural drainage of said lands is towards the land of the plaintiff, and the effect of the increased lowering of the main ditch *has resulted in great damage to the adjacent lands whereas no beneficial results have been obtained for the lands claimed to be owned by the plaintiff.*

That is the gist of the defense in this case. Defendants Bauman and Copeland owns part of this land they say is being damaged.

In the answer, among other things, it is alleged that the plaintiff could have applied to the court to have new plans made for the lowering of the ditches through his land, etc., and that the same could have been heard and determined.

We repeat that the plaintiff does not want any change in the plans and specifications. He has never requested it; does not request it in this proceeding, and only asks that the ditches as installed—the district, and by the district be kept cleaned out so water can run through them and the land drained.

They also allege a large expenditure of money on ditches which they claimed were for plaintiff's benefit, but upon the hearing it was shown conclusively that this money was not expended for the benefit of the plaintiff but for all of the people in that section of the district, and the court denied the admission of that evidence.

The court made no findings of fact upon the issues involved. The findings of fact appear on pages 74 to 76, wherein it finds: (1) The diversity of citizenship and the amount involved; (2) that there has been considerable litigation regarding the drainage of this land, and when the defendants qualified; and (3) that the defendants have not been guilty of malfeasance, misfeasance or non-feasance in their conduct as commissioners and are not liable personally for mistakes or honest intentions or errors in judgment. That is a conclusion of law. Nowhere does it find what the facts are or what has been done by these commissioners, or what has not been done by them, and the court, in render-

ing the opinion and deciding the case, decided it upon the question that in his opinion the commissioners had a discretion in cleaning out the ditches and in doing the work, or not doing the work, to drain the land as they in their opinion thought best. It is the plaintiff's contention that the statute and the law imposes an absolute, mandatory duty upon the defendants to clean out the ditches to the depth and the extent they were originally designed, and that they have no right to say that in their opinion the plaintiff's lands are not worth draining; neither do they have any right to say that the court erred in the various judgments and decrees entered, directing the commissioners to do this work.

It is a further contention of the plaintiff that the state court having adjudged that this work should be done, and having adjudged that the ditches should be cleaned out, and the assessments having been made upon that basis, that the right to have this done is *res adjudicata* and the defendants cannot defend upon a claim that they can exercise their judgment instead of following the decision of the court made upon hearings in the proceedings when the parties submitted the matter to the State court and secured a final and binding judgment in the matter.

EVIDENCE

In our opinion the evidence in this case is con-

clusive that the defendants did not do what the law requires them to do and keep the ditches cleaned out and drain this land, but wilfully refused to do so. The history of this district shows that this land was low and was not to be assessed until after it was reclaimed. The District originally was brought into existence in 1920. The decree approving the supplemental report affecting this particular land was not entered until August 20, 1924. Exhibit 17, pp. 215-255. This decree shows that it was entered on condition that the ditches be cleaned out and improved after objections had been made to it. Pages 253 and 254, where the decree specifically provides for cleaning out and deepening the ditches.

A stipulation had been entered into that this would be done and upon that stipulation the objections were overruled. The stipulation is set out on pages 213 and 214.

That decree was not complied with and in December the land owners sought to set aside the same because the ditches had not been cleaned out. Exhibit 17, pages 208-212. This petition was filed December 13, 1924.

On March 16, 1925, a stipulation was filed relative thereto. Exhibit 15, pages 194 to 197. An answer was filed March 7, 1925, Exhibit 15, pages 196 to 201. Findings of fact and conclusions

of law were entered on this, Exhibit 16, pages 202 to 207.

Neither of these orders were complied with. This appears in Exhibit 12, pages 171.

Notwithstanding all of these various orders and decrees made upon the hearings, the commissioners refused to do the work of cleaning out these ditches. Martin Woldson secured title to this land in 1932, and he appeared before the board many times trying to get them to clean out the ditches. Exhibit 4, page 115 (testimony of John Davidson); page 118, where he testified as to Woldson's appearance:

“Q. How many times? A. Time and time again.”

On page 312, in the testimony of Mr. Woldson, as follows:

(Mr. Woldson “A. Well, I was talking with them from time to time every year trying to get them to do something to drain the land and they would do some from time to time but a very little, and in 1939 I believe they did more that year than they ever did at one time before.”

He wrote the district various letters; Exhibit 4, pages 115-117 was written January 26th, 1940, in which he stated that from time to time he had written them about these conditions. In this letter he called attention to a new style pump that he thought could be purchased and used more

economically. This was afterwards done. At the time this letter was written the present defendants were the commissioners of that district. In May, 1940, he wrote the defendants, Exhibit 2, pages 109 to 111, calling attention to the fact that a resolution had been passed to exempt the land from assessments until it could be made subject to cultivation; that such was not done, and that he demanded that the maintenance work be done.

To this the commissioners replied by putting on their record a statement that to clean out the ditches would be more than the land was worth, etc. Exhibit 3, pages 112, 113. A few days later they notified Mr. Woldson they would not be responsible for any expenses he incurred in cleaning out the ditches.

On September 14th he wrote them again calling attention to the fact that slides had occurred, the conditions had existed, and that something should be done. Exhibit 7, pages 129 to 131.

In November he sent them a copy of his statement. In the meantime, after Mr. Woldson wrote them the letter in January, 1940, they passed a resolution that no more work would be done in the Mirror Lake district. Mr. Davidson, secretary, testified as to the minutes, as follows:

“Q. The minutes of February 5, 1940, I call your attention to those minutes to which

a certain amendment was added, this amendment was offered by Mr. Bauman that the drainage District Number 1 would do no more work in Mirror Lake laterals from then on.

“A. It was made by Mr. Bauman.

“Q. What was done with that resolution?

“A. It was carried.

At their meeting on June 28th, 1938, an order was entered that the ditches be cleaned out, Davidson, page 125, testified:

“In 1938, calling your attention to the minutes of June 28, 1938, was the arrangement or the question of cleaning the ditches again taken up?

“A. It was ordered.”

Mr. Woldson had had the matter of cleaning the ditches up with them since 1938 on down. Page 124. After the meeting of February 15th 1940, and in August, 1940, they apparently had a change of heart and they agreed to do the work if Woldson would cash the maintenance warrants:

“(Mr. Davidson) A. Yes the meeting of August 10, 1940, a letter from Mr. Woldson in regard to cleaning the main ditch was read. The same was ordered done provided Mr. Woldson would cash the 1941 maintenance warrants.”

Mr. Woldson wrote them, calling attention to the water data from April 26th, 1939 to January 1, 1940. It shows that it took only six days to

pump all of the water out of Mirror Lake. Exhibit 6, pages 127, 128.

Bauman then agreed to clean out the ditches. He did not do so and in September, 1940, Mr. Woldson wrote him, Exhibit 7, page 129.

Mr. Woldson then proceeded to do the work himself and afterwards sent them the bill therefor, which appears as a part of Plaintiff's Exhibit 8.

Because of these slides and obstructions being in the ditches the water stood about bank full in the ditches. The ditches were shallow, running from a few feet through Woldson's land to about eight or nine feet at the sump which was a mile or two below Mr. Woldson's land. When Mr. Woldson cleaned out the ditches, the water level dropped $1\frac{1}{2}$ to 2 feet, and because Mr. Woldson cleaned these ditches he was able to and did get plowed and in cultivation from 90 to 100 acres of land which produced good crops. (Pages 143, 135, 136, 264, 265, 269, 274, 275, 281, 282, 291, 292, 301, 302 and 325.)

Before they started to clean out these ditches they were all caved in, had weeds, cattails, and other debris in them. (Pages 259, 273, 274, 283, 289, 290, 275 and 315.)

The rim ditch was put in for the purpose of catching the water that seeped down from the

hills, carrying it off and delivering it below Woldson's land. (Pages 141, 142, 272, 276, and 300.) This rim ditch was filled up for many years, up until 1939 or 1940, when it was cleaned out for the first time. (Pages 276, 278, 289, 290, 300 and 315.) It would not carry water in the fall of 1939, page 296.

A. B. Ashby testified as follows, Page 383:

"If you allow the water to stand in them, do they fill up with muck and debris?"

"A. That is right."

J. H. Cave, the engineer who built the district and who testified for the defendants, stated:

"Q. You even have to redig them and open them up so that the sun can get to them and harden the banks so that they will stand up.

"A. That is correct. * * * You see that stuff was just about like water.

"Q. It was slimy. A. Yes sir.

"Q. It takes a long time to get that to harden.

"A. Yes sir.

"Q. To solidify at all. Yes sir."

All of plaintiff's witnesses testified to the same condition, (Davidson, page 136. Pages 263, 315, 324, 325, 359 and 360.)

The water was not kept off this land at all until 1939. (Pages 335 and 336.

The land of Bauman and Copeland is above Woldson's land. The district comprises approximately 4400 acres, page 159. About half of the length of the large ditch, referred to as the main lateral, is above Woldson's land and drains into it. (Pages 159, 188, 333, 340, 406, 407, 157 and 158.)

Tules and weeds grow in the ditches and interfere with the drainage if not cleaned out. (Pages 257, 289, 290, 301, 274 and 314.)

These lateral ditches are dug by drag line and it is customary to clean them out yearly, especially where the ditch is shallow and the water fall slight, and the only way it can be done is by a dragline and using a clam shell where sheet piling or spiling have been driven. (Pages 157, 260, 262, 295, 296 and 297. The district owned a drag line, page 317.

If these ditches were not kept open they filled up and the water table rises, making the land soft and water stands on the land, as well as causes the ditches to slide in. (Page 156, 260, 273, and 283).

Woldson's land is practically level. The two defendants had land above the plaintiff and in the Answer claimed it was making their land too dry and gave that as one of the reasons they did not drain Woldson's land. Bauman made this statement to Mr. Morkelberg:

“Q. What did Mr. Bauman say? A. He said that by lowering this main ditch it would make it too dry in his part of the country. (Page 277).

Robert Nelson, page 284, testified:

“Q. Have you had any conversation with Mr. Bauman to the effect that the draining of this water would have on his land?

“A. Just talking this Summer and he said it would affect his higher land.”

The Answer alleges substantially the same, pages 52 and 53:

“The effect of the increased lowering of the main ditch has resulted in great damage to the adjacent lands, etc.”

If you do not remove the slides it keeps the water higher in the ditch and each of the slides hold the water up from eighteen inches to two feet. (Pages 257, 258, 273, 283, 294, and 300). When the slides are removed it lowers the water and the land dries out, page 274. None of the ditches through Mr. Woldson's land had been touched for many years until 1939. The so-called main lateral had been cleaned out at various times to his lands but at no time was it cleaned out through his land so that the water would flow. In the Fall of 1939 the district employed Mr. Farnum. Up until that time the dragline only went to where the ditch turned northeast and not beyond there, Page 312.

Mr. Farnum and Mr. Littlefield testified for the plaintiff and were both experienced drag-line operators. Mr. Farnum cleaned out the main lateral clear from the booster pump about a half mile towards Bauman's place and then went around the main ditch and part of the laterals. The laterals were so sloughed in and filled up he could hardly find them and there had been no work done on them for years. Page 289. The rim ditch was not in a condition so it would carry any water. P. 290. He was hired by the district officers to do the work of cleaning out these ditches. While he was on it and as he started on the ditch towards the Great Northern Trestle, he was notified by Bauman that the district would not pay for any work beyond that trestle. PP. 293-295. As the ditches had not been cleaned out for many years, of course they would not stand up in many places, page 316. It was necessary to go through these ditches again the next spring and clean them out. Mr. Woldson wrote the commissioners and asked them to do the work and they positively refused. They now claim that they later did do some work, but by their own orders that was limited to two days time in working on the slides in the fall of 1940. Exhibit 35, Page 447. They refused to pay Farnum and the crew for the work that they had done and cut their bill almost in half. PP. 123.

Mr. Littlefield had been familiar with this district since 1929 or 1930 and he had worked there in the year 1938 or 1939 and again in 1940 and 1941. The work that had formerly been done was from the booster pump up to Bauman's in the main lateral, which was the only ditch that had been worked on in recent years. P. 257. He found the main ditch filled with slides and he removed them. PP. 257, 258 and 274. The main lateral running under the Great Northern Trestle was full of weeds and silt and he cleaned that out, P. 258. There were four dragline laterals in the district. They were two and a half to four feet deep and ten to twelve feet across. They had slides in them. PP. 274, 289 and 290. These slides, growth, etc., raised the water table and made the land wet, P. 273. The ditches also had lots of weeds growing in them. PP. 275, 260, 290, and 291. The slides were in the main laterals when he went there in 1940. He testified that it is a common thing to find slides in drainage districts and that it would be a proper thing to put sheet piling to keep out these slides as it would only take about three hundred feet for that kind of work, PP. 261 and 262; that there was seven or eight hundred feet of this kind of sheet piling near the outlet and on Bauman's land there is about two hundred feet of it. The main lateral is five or six miles long with a slight

fall. Mr. Littlefield gave as his opinion that sheet piling would take care of the slides. P. 264.

As soon as the work was done the land dried up and much more of it is formed and crops are growing on it. PP. 264, 265 and 275.

Littlefield worked for the district in 1940 but the district only cleaned out the main ditch, P. 266. The work for Woldson was on the laterals. He said you could shut off the slides by cribbing which is the same as sheet piling. P. 278.

Farnum testified, PP. 286 to 297, that he had run a dragline there in the years 1939 and 1941. In 1941 he was working for Mr. Woldson. The district hired him in 1938 and 1939. First he had to get the dragline and he then went around these various dragline ditches, P. 290.

He testified:

“Q. Could you state whether or not there had been work done in these ditches, from your experience?

“A. It had not been for several years.

“Q. What was the character of the growth in there?

“A. Cat-tails that had grown up there years before were laying there dead. * * *

“A. Plenty of all kinds of weeds.

“Q. In regard to the rim ditch what did you find there?

“A. It was sloughed in places. * * *

“A. It was not fit to carry water. It was sloughed in and had weed growth in it.

“Q. These lateral ditches, were they the same?

“A. Yes sir.”

The witness testified he had started the work late in the fall, about the 25th of October. All parties agreed that the dry time of the year is the best to do the work, P. 291. When asked why, he said:

“The banks will turn out and stay lighter, they won’t cave in so quick.

“If the water is drained out at that time what effect does it have on the bank?

“A. It stays drier and firm, it doesn’t cave in so much.”

He then testified that the land was not in condition to be farmed there, but when he was there in 1940 lots of it was being farmed, P. 291. When asked if any member of the board had told him not to go ahead with the work after he had been employed, he said:

“Mr. Bauman told me plainly after I turned a certain corner they would not pay any more of the expenses.

“Q. What corner was that? A. The bend up by the Great Northern track.” P. 292.

He then testified that from his experience you could put in spiling; that he had driven lots of it and that there was lots of it in the district, and that it would cut off these slides, P. 293.

All the witnesses testified there was no dispute on the fact that the reasonable rental value of land was \$10.00 per acre when the land had been drained, PP. 297, 298, 299 and 308.

Something was said about some spring holes in the district, but it was shown that they were common and that they were easily cut off and drained, P. 306.

Mr. Woldson had been a contractor all of his life, and he testified that the bill he submitted, Exhibit 20, was proper; that he had paid all the bills and that it was a necessary expense in doing this work, which he had done after the commissioners refused. He testified that Copeland gave his reason for refusing to drain the land as follows:

“A. He told me that that land was operated by Mr. Zimmerman and Mrs. Morrison and that they had lost everything they had put in it and there was no reason why I should do the same.

“Q. What did you say? A. I asked him if he thought it was fair to a man who paid his taxes that he should not have his land drained, he said that he had to please those that helped to promote him and to elect him commissioner.” P. 320.

Neither Bauman nor Copeland denied the statements which witnesses said they had made. This land is the best land in the valley when drained, P. 323. Adjoining lands that have been drained produce excellent crops, justifying a rental of from \$15.00 to \$20.00 per acre.

Mr. Woldson testified that from his experience a few spiling would block these slides, P. 323, his answer being:

“A. A man could drive a few spiling to take care of it the same as we did in the other place.”

He testified the same condition existed on Bauman's land and it was done there. Besides that, in other places where it was bad they had put in pipe. The entire distance where these slides occur do not exceed three hundred feet, P. 324.

If the ditches were cleaned out in July and August the banks would harden and become staple, PP. 324 and 325, and it would only take a year or so of keeping the ditches cleaned out before they would stand up, PP. 325 and 326.

Something was said about Mr. Woldson being the original contractor but he took that on a unit basis and did the work as he has directed, P. 330.

Mr. Woldson asked the commissioners to either drain his land or cancel his assessments for the

maintenance of it, P. 331.

Bauman's land is higher than Mr. Woldson's land, P. 333.

In Woldson's opinion the water from the so-called springs is seepage from the foothills, P. 333.

Something was said about a new type pump that was put in in 1940. He wrote the commissioners, Exhibit 4, on January 26th, 1940, and suggested putting this pump in, which has worked very satisfactorily, as it is an automatic pump.

Exhibit 24 was a map drawn by J. H. Cave, the engineer for the district originally, and showed these main dragline laterals as having been originally projected for building in the district, and showed Mud Lake, PP. 355, 356. It was originally planned for pumping the Mirror Lake district. They knew at that time they had to wait until Mirror and Frye Lakes drained out before they put the ditches in and that it would be a mud bottom, PP. 358, 359.

Cave sustained the plaintiff's contention all the way through that Lateral 5, which is referred to as the Rim ditch, was put in to carry off the water from the foothills.

Mr. Cave further testified that during high water there is no drainage out of the district at the outlet. P. 362.

The commissioners were on the stand and made a very peculiar showing. Copeland stated that in his opinion 75% of all the maintenance in the district was spent in the Mirror Lake district, but when it was checked as to how much was spent they estimated \$1,000. The trouble was he was trying to charge to Woldson's land all of the expense for draining this entire district, which takes in Sections 4, 5, 28, 33 and the South Half of 32, and drains about 3500 acres, PP. 406, 407, Plaintiff's Exhibit 24.

Defendant Copeland claimed they used the dragline in doing the work in 1940, but he admitted that they had limited the time to two days, PP. 410 and 411, and their resolution showed that such was the fact. Ex. 35-P, 447. They even admitted that it only takes a few slides of that kind to boost the water to the surface of the ground, PP. 410, 411 that the new pumps were put in the Winter of 1940 and 1941, PP. 411, 412; that he never had any experience with putting in sheet piling, never went over to see where the plowing on any of this land was being carried on or what its condition was, P. 414. He didn't even remember passing the resolution that the land was not worth the expense of drainage, P. 414. He said he was never there prior to the time the dragline was on it in 1940, and did not know if it was capable of being plowed or not, nor did he know how high the water stood in the

ditches before the dragline went through, PP. 414, 416. The drag line was not there until the Fall of 1940 and much of the land had been plowed there that Spring and Summer. He didn't even know the water had been getting lower since they started to open the ditches in 1939, and thought all the laterals had been cleaned out in 1939, P. 406. He was one of the commissioners who put on the record the fact that this ground was worthless.

Bauman's testimony was about the same. He did not know anything about this part of the district:

"A. I have not been in the southern end any great extent only between the subway and where Oscar Davis goes into his place, that is very swampy." P. 419.

He was not over this in 1941, PP. 418, 419. He knew it had been a swamp before 1939. He admitted the rim ditch was there to catch the water coming down from the hills, P. 420. After the water drains down the main lateral to the sump they raise it eight or nine feet to get it into the main ditch.

ASSIGNMENTS OF ERROR

The appellant has designated in the appeal herein the points upon which he expected to rely being set forth as 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, being the Assignments of

Error set forth, appearing on pages 85 to 91, inclusive, of the transcript of the record.

A number of the assignments of error can be grouped and argued together as the argument applying to any one of them will apply to all.

I.

Assignments of Errors 1, 3, 4, 6 and 7 can all be grouped together. These Assignments of Errors are on the ground that the appellees have failed to perform a statutory, duty imposed upon them by law, which is mandatory, and that therefore they are liable for the damages. The undisputed evidence shows that the ditches were not cleaned out and the land of plaintiff was not drained.

II.

Assignment of Error No. 2. This Assignment is based upon the claim that by the decrees of the state court, set forth in the evidence, it was adjudged that the owners of the land were entitled to have the ditches cleaned out and the land drained, and that said matter is *res adjudicata*, and therefore the plaintiff is entitled to a finding thereon in his favor.

III.

Assignments of Errors Nos. 5 and 15. These are based upon the claim that as the record shows, Woldson lost the use of this land for the

time complained of and that the undisputed evidence is that it was worth \$10.00 per acre, and he is entitled to that as damages; that it shows he was required to pay maintenance assessments, and the defendants refused to maintain or drain his land, and he is entitled to recover the assessments paid which have been lost to him, and that as he was required to do the work himself in order to get the land drained, and thereby did drain approximately 100 acres of it, he is entitled to the money which he expended in reducing the damages, and which expenditure was for services the defendant should have performed.

IV.

Assignments of Errors Nos. 8, 9, 10 and 11, can be grouped together as they cover the same proposition, that the findings of fact are not such but are conclusions of law, and they are not sustained by either the evidence or the law.

V.

Assignments of Errors Nos. 12, 13 and 14, can all be grouped together as it is our contention that the court has failed and refused to find on the issues presented and that such constituted error.

Assignments of Errors Nos. 8, 9, 10, 11, 12 and 13 can be grouped under the following heading:

“The Court failed to find upon the facts in-

volved, and that the findings made were but conclusions of law, and if there is any finding of fact included therein, it is not sustained by any evidence. As this covers more than the two printed pages, they will be attached as Appendix No. 1 to this brief.

Summary of Assignments of Errors Nos. 8, 9, 10, 11, 12 and 13:

It is our contention that under the law of the United States the District Judge is required to find upon every issue involved. Rule 52A of District Courts, adopted by the United States Supreme Court, provides as follows:

“In all actions tried upon the facts without a jury, the court shall find the facts especially and state expressly the conclusions of law thereon, and direct the entry of the appropriate judgment, etc.”

It is our contention in this case that the court failed and refused to make findings of fact. The appellant cannot be said to be derelict in this matter. We filed objections and exceptions to the proposed findings and set forth specifically the reason we not complain on, P. 70 to 84, inclusive. In that we asked for an oral hearing on the matter, P. 83. The objections were filed January 19, 1942, and summarily overruled by the court on the same day, and a hearing was refused the appellant.

The findings of fact in this case, in our opinion, do not constitute findings of fact and are not responsible to the issues involved. The findings of fact appear on pages 73 to 76, inclusive. The first finding is on Page 74, and it simply finds the jurisdictional matters. Finding of fact No. 2 does not find any of the facts involved, but does find that the defendants nor their bondsman are not liable for acts of omission or commission of defendants prior to the date of their qualification as commissioners of said district. Plaintiff has never contended that they were. On the other hand, all of our claim of damages was for matters happening since and we did not endeavor to prove any claim of damages prior to these defendants becoming officers or make any such claim.

Findings of Fact No. 3 in our opinion is not a finding of fact but is a conclusion of law. It finds that the defendants have not been guilty of any malfeasance, misfeasance or non-feasance in their conduct as commissioners, and that they are not personally liable for mistakes or honest intentions or errors in judgment. The court does not find what they did do or what they did not do. He concludes as a matter of law that they are not guilty of these acts but does not make a finding so that this court can pass upon the question as to what these parties did. In our opinion the court should have found the fact,

then made this conclusion of law from the facts found. The facts to be found were: Did the defendants drain this land? Did they keep the ditches open? Does the law require them to drain this land? Does the law require them to keep the ditches open? Upon finding these facts and finding of the conditions as they actually existed, then the court could make his conclusions thereon, but the trial judge has not furnished this court with any facts especially found and separately stated as required by this section of the rule. *Dunn v. Trefry*, 260 Fed. 147, First Circuit Court, where the court said as follows:

“We recognize the rule that, where there is a conflict of testimony and the credibility of witnesses is involved, the finding of the District Court is not to be disturbed, unless it is clearly wrong. But where, as here, these circumstances are not present, and the finding is a conclusion from admitted facts, we do not think the rule applies.”

We believe, to begin with, that there is no evidence from which the conclusion can be sustained in this case. We further believe that the alleged facts are nothing but conclusions and the court has refused to find the facts, and that, therefore, the law had not been complied with. The rule quoted is very largely 28 USCA, Sec. 764.

Unquestionably, the intention was under this rule to require the court to make a specific find-

ing upon every question of fact raised. This case falls so far short that there is in reality no finding whatever.

The section referred to has been passed upon many times by the Federal Court. *United States v. Stratton*, 88 Fed. 54. In that case the court said:

“From the statement given above of the proceedings in the court a quo, it will be seen that, while an attempt was made to comply with the provisions of Section 7 above quoted, *yet there is no such specific finding of facts as to exhibit exactly the services for which the claimant asks compensation.*”

They then reversed the decision of the court below because of insufficiency of the finding of fact.

This is not new in this Circuit Court, but has long since been passed upon, *United States v. Kelly*, 89 Fed. 946, and the findings were very much more voluminous than here. The court says:

“As has been seen, it is by section 7 of the act made the duty of the trial court to set forth the facts of the cause specifically in its findings, as well as its conclusions upon all of the questions of law involved. * * * The facts upon which the court concluded that the defendant in error was entitled to judgment against the plaintiff in error are not stated at all.”

The court set forth what the findings would amount to but held they were insufficient and

reversed the case.

In this case, the issues raised were:

1. That the laws of the State of Idaho imposed certain duties upon commissioners of drainage districts, and

2. The court did not find whether these duties were imposed upon the parties or not. It just found the conclusion that they were not guilty of malfeasance, non-feasance, etc., nor were they liable for mistakes, etc. The court should have found what they did do and what they did not do.

We allege that the courts of Idaho had made specific findings and entered the decrees, adjudging that the owners of the land were entitled to have their land drained. The court found nothing on this at all. We allege that between certain times the land was not drained. The court found nothing on this at all. We made demand upon the commissioners and they refused to drain the land, and put on record a notice that they would not drain it. The court found nothing on this at all. It seems to us that it would be taking up the time of the court uselessly to follow this farther. If such a finding as this can support the issues involved herein, which are set forth in the general statement, then you might as well dispense with findings altogether, as these findings find nothing. If the

court had set forth the facts and then found the alleged findings as conclusions of law, there might have been some reason for it, but certainly there is none as findings of fact.

Under the old practice the court was not required to make special findings in all cases, particularly actions at law, USCA Title 28, Par. 773. Under that rule it was generally held that the court did not have to make special findings but that when it did make special findings it had to make a finding upon every question involved. Where a finding is required and it is not in the record, the case will be reversed. *Packer v. Whittier*, 1st Circuit, 91 Fed. 511. There are many other cases upon this question, but those rules are old and well established. Rule 52, subdivision A, was enacted to require the findings, does require the findings, and where the findings have not been made requires a reversal. In this case the findings have not been made and therefore the case should be reversed.

O'Brien's Manual Fed. Appellate Procedure, Third Ed., P. 17.

Assignment of Error No. 2, is as follows:

The Court erred in making said decree for the reason that the undisputed evidence in said cause shows that by the decree of the District Court of the Eighth Judicial District of the State of Idaho, in and for Boundary County, judgments and decrees were duly entered re-

quiring the land of the plaintiff to be drained and requiring the Commissioners of Drainage District No. 1 to do whatever was necessary to drain said land and that said Commissioners failed, neglected and refused to do so."

This Assignment of Error is simply the age old and oft decided principle that where a court of competent jurisdiction has once passed upon the question and decided it, it is forever at rest and can never be raised in any other court at any time or place.

The Idaho Codes provide for the organization of drainage districts, Sec. 41-2501 to Sec. 41-2609, inclusive. The corporate powers given to the officers are as follows:

"Sec. 41-2501.—Any portion of a county requiring drainage or diking, or both, may be organized into a drainage district, and when so organized such district and the board of commissioners hereinafter provided for shall have and possess the power *herein conferred by law upon such district and board of commissioners, etc.*"

The act then provides for the filing of a petition for the organization, Sec. 41-2505; provides for the filing of objections upon the the hearing, Sec. 41-2508; provides for the decree organizing the district, Sec. 41-2509; provides for the appointment of commissioners, Sec. 41-2510; provides for the appraisalment of the benefits and damages, Sec. 41-2514; provides for changes being made in the plans upon application of the

petitioners and the hearings thereon, Sec. 41-2517, 41-2518; provides for objections and hearings thereon, Sec. 41-2520, and provides for the confirmation of the hearing and for findings and decree thereon. This provision is as follows:

“41-2522. FINDINGS AND DECREE.—If the findings be awarded against the validity of the proceedings the same may be dismissed. If the findings be in favor of the validity of the proceedings, the court, after the report shall have been modified to conform to the findings, or if there be no remonstrances, shall confirm the same, *and the order of confirmation shall be final and conclusive, the proposed work shall be established and authorized and the proposed assessments approved subject to the right of appeal to the Supreme Court.*”

The act then provides for a supplemental report, Sec. 41-2523; provides for an appeal to the Supreme court, Sec. 41-2524; provides for additional levies made in the same manner as the first, Sec. 41-2530, and provides that the assessments may be contestable, Sec. 41-2534.

The assessment roll being final, becomes a lien on the property, Sec. 41-2535.

The assessments are entered as tax liens, Sec. 41-2536.

The law then provides for the duties of the officers, Sec. 41-2539, as follows:

“All drainage districts organized under the

provisions of this chapter shall have the right of eminent domain, * * * to build and maintain drains, canals, sluices, bulkheads, water gates, levees and embankments; *to establish and maintain pumping plants and to construct and maintain and keep in repair all works requisite and necessary to the end that the lands in the district may be reclaimed.*

It then provides for enlarging other works, removing natural obstructions, and doing whatever is necessary to construct the works. It provides that if there is a change in the premises it must be presented to the District Court, Sec. 41-2543, which provides as follows:

"In case any substantial changes in said system of improvement, or the manner and construction thereof, shall be deemed necessary by said board of commissioners at any time during the progress thereof, and the written consent to such changes can not be procured from said landowners, then said commissioners for and on behalf of said district, shall file a petition in the district court of the county within which said district is located, setting forth therein the changes which they deem necessary to be made in the plans or manner of the construction of said improvement, and praying therein to be permitted to make such changes, etc."

It then provides for giving notice for a hearing thereon.

As before stated, when the original drainage was undertaken part of the land was swamp land and somewhat submerged, consisting of

three minor lakes, namely, Mirror, Frye and Mud Lakes. Until these were unwatered the exact condition would not be known, but the engineer made soundings and laid out a general plan. These lands were not assessed until after they were unwatered, and in 1940 the commissioners' supplemental report was submitted. At that time the landowners owning this property filed objections to this report on the ground that their land had not been drained. This objection was filed on the 16th of August, 1924, and on the 20th day of August, 1924, a stipulation was entered into, stipulating that the commissioners would within a reasonable time clean out the ditches on the property now involved. This stipulation is set forth on page 214.

After stipulating these facts, the objections to the supplemental report were withdrawn. This stipulation provides:

“That in the decree to be entered herein, there shall be inserted an order to be made by the court, directing the Commissioners to clean out, deepen, and improve the drainage ditch as now constructed within a reasonable time, to provide for the suitable and sufficient drainage of the land of said objectors, covered by the objections filed herein.”

Thereupon the decree confirming the supplemental report was entered and appears on pages 215 to 255 of the record. That decree conformed

with the stipulation and beginning on page 253, it provides:

“It is further ordered, adjudged and decreed that the Commissioners of Drainage District No. 1 of Boundary County, Idaho, within a reasonable time, clean out, deepen and improve the present drainage ditch so as to suitable and effectively drain the land of the objectors, to-wit: (They then described the land, of which the land in controversy is a part.)

This order was not complied with.

On the following December 13th the same objectors filed a petition for an order to show cause to vacate this decree because it had not been complied with, Plaintiff's Exhibit 17, PP. 208 to 213 of the Record. Thereupon the Drainage District filed its answer. It appears on pages 197 to 201, inclusive. This answer admits all of the facts of the petition. They then allege that they did not complete the drainage of the land by reason of obstructions having formed in the drainage ditch between the lands of the objectors and the outlet of said ditch. They then allege that they had employed an engineer to survey the land and that he had made a report that the only thing to do in order to completely drain the land of the objectors is that the entire ditch, from its outlet throughout its entire length, be cleaned out and the obstructions removed, and the Commissioners then alleged that that would be done and that all of this work was properly

chargeable to the District as maintenance, and not a proper charge against any portion of the land within said District as an additional assessment.

Thereupon, they made another stipulation, Plaintiff's Exhibit 15, pp. 194 to 197. The owners of the land and the District stipulated that the land would be drained and that the obstructions caused by the caving of the banks so that the ditches were not as deep as called for caused the trouble and that laterals which the Commissioners had recommended, would be built. Upon this being heard the court made full findings of fact, conclusions of law, and decree, Exhibit 16, PP. 202 to 207, exclusive, wherein the court found that the commissioners should, as an item chargeable to the district. and as maintenance,

“proceed to clean out said ditch to the original level thereof and maintain said ditch to said original level, * * *”

It is our contention that these three decrees, having been made, are conclusive, and in any and all proceedings thereafter taken they are binding upon the district and all of its commissioners, as well as upon the land owners.

It is further our contention that if any party wants to make any change in this district system they must do so in the manner provided by statute, and until such is done those decrees delineate and determine the rights of all parties,

and the commissioners are bound to take that as the law and their authority, and act accordingly. If they can refuse to clean out the ditches and keep them cleaned out, they can refuse to drain the land. If the commissioners can refuse to drain the land, then they are taking the landowner's property without due process of law. They assessed this land at all times and all assessments against it were paid. Yet at no time did they ever drain it.

After Martin Woldson became the owner of the land he met with the commissioners a number of times and they promised him that until they did drain the land they would not charge any maintenance taxes to it, but they continued to assess this land. In 1938 and 1939 he had to pay the maintenance taxes for back years to keep the land from going to tax deed. He thereupon demanded of the commissioners that they proceed to clean out these ditches as required by the orders of the court. He asked for no change whatever, only that the ditches which were there, be cleaned out and kept cleaned out.

The commissioners now set up that they have the right to exercise their judgment as to whether the land should be drained or not. Our answer to that is twofold: first, by the decree heretofore entered they are bound, and second, by the laws of the State of Idaho, they have no

right to refuse to clean out or maintain the ditches in the district, but it is their mandatory duty to keep them cleaned out at all times.

The record shows that Mr. Woldson appeared before the board many times, In 1938 or 1939 they agreed to clean out the ditches and started Mr. Farnum doing that work. While he was doing the work the defendant Bauman came to him and told him that when he turned a certain direction to go onto Woldson's land to clean out some of the ditches the district had built to drain these lands, that he must stop there and not do any of that work or he would not be paid. However, as he had been instructed to clean out the ditches he proceeded to do the work. He found the ditches caved in, filled up, full of growth, silt, etc., as the water had stood bank full and they had not been cleaned for years. Naturally there were some slides that came back in the ditches when he was stopped after partially cleaning them out. The next Spring Mr. Woldson called the district's attention to this fact and they positively refused to clean them out. He then made a further written demand upon them and notified them that if they would not clean out the ditches, and drain his land, he would proceed to do so and charge the cost to them, and they notified him they would not pay a cent. It was then too late to get them cleaned out for a full crop that year.

Mr. Woldson started this work and after spending about \$1500 removing the obstructions so that the water dropped about two feet. The slides in the ditches had kept the water table up so that it kept the land soft, but when the water dropped Mr. Woldson was able to plow ninety to a hundred acres and put it in crop, upon which last year a heavy crop was grown.

Bauman made the statement that they had spent more on the land than it was worth.

During all of this time the bond assessments and bond interest had been paid so that the district had collected the enormous sum of \$119.75 per acre from the owners of this land, yet they did not drain it or reclaim it and have positively refused to do so.

It is our contention that the various decrees referred to settled the rights of the parties and that when the case comes into this court the only thing this court will consider is whether or not the decrees were made, and if so, this court will not go behind it as it is *res adjudicata*, and the court accepts it as such. We think this rule of the law is applicable to all forms of judgments and concludes all parties connected with the controversy.

The judgment of a court of competent jurisdiction, so long as the same is unreversed, is conclusive on all persons involved as to the issues pre-

sented by the pleadings and passed upon by the court, *Elliott v. Porter*, 6 Idaho 284, 59 Pac. 360. Quoting from the decision, it is said:

“A judgment of a proper court, being a sentence or conclusion of the law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries, ever afterward, as long as it shall remain in force and unreversed. * * * A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of the litigious disposition on the part of suitors to the preservation of the public tranquillity and happiness.”

Applied to this case these orders and decree are binding upon the District Court and all of the commissioners ever afterwards, and are also likewise binding upon the landowners.

Richardson v. Ruddy, 15 Idaho 488, 98 P. 842, where the court held that if the court had jurisdiction, whether it had made an error or not, the judgment is binding upon all parties.

Village of Heyburn v. Security Savings & Trust Company, 55 Idaho 732, 49 P. (2d) 258, the court again said:

“Judgment of the proper court puts an end to all further litigation on account of same matter, and becomes the law of the case,

which cannot be changed or altered, even by consent of parties, and is not only binding on them, but on courts and juries, ever afterwards, as long as it shall remain in force and unreversed.”

They even went so far as to hold that it not only was binding as to matters decided but as to all matters that should have been decided in that case. *Ex Parte Moran*, 144 Federal 594, on page 603 and following, where appellant raised questions which the court held would perhaps have been error had they been presented in time, but said the courts may have decided it wrong but that was not material if they had jurisdiction to pass upon the question that was settled, and stated as follows:

“That court had ample authority to determine whether or not their indictment should be received and whether or not the petitioner should be tried upon it. Its action may have been erroneous, its decisions of these questions may have been wrong, but they fell far within the lawful limits of its jurisdiction and they were not violative of the Constitution. * * *

“As it does not appear in the case in hand that the district court of Comanche county was ever without jurisdiction of the case or the person of the petitioner nor that it exceeded its jurisdiction in the conduct of the proceedings which resulted in his imprisonment nor that it in any way violated the Constitution of the United States, etc.”

They denied the writ.

This court, in a comparatively recent case, de-

cided the same question, *Lineker v. Marshall*, 7 Fed. (2d) 875, where the court said:

“United States Circuit Court of Appeals is not a court of appeal authorized to correct judicial errors charged against state court.

“A right, question, or fact distinctly put in issue and directly determined by court of competent jurisdiction as ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, even if such suit be for a different cause of action.”

In this case the court said:

“It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * Such claim or demand, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.”

They then cited various other cases which are conclusive on the matter, and we submit that in this proceeding the District Court erred in not accepting the three decrees of the state court as absolutely conclusive, as by those decrees the owners of the land in controversy were adjudged the right which Martin Woldson contends for, and these commissioners wrongfully refused to do their duty and give him that to which he was entitled.

Asher v. Bone, 100 Fed. (2d) 315, 9th CCA, is direct to point. That was a case where the decree of the Probate Court was in controversy. It was claimed that the Probate Court had erroneously decided a certain matter, but the court said:

“It is not for Circuit Court of Appeals to determine that Idaho probate court erroneously interpreted will and to correct such error, as jurisdiction to determine interests of claimants of decedent’s estate in such state is exclusively in probate courts thereof, and *such court’s determination, whether right or wrong, is conclusive and subject only to be reversed, set aside, or modified on appeal.*”

Certainly this same rule applies in a greater degree to a District Court which under the Idaho Constitution is the court of general jurisdiction to hear and determine all these matters.

Assignment of Error No. 1:

“The District Court of the United States for the District of Idaho, Northern Division, erred in making and entering the judgment and decree in said cause for the reason that said judgment and decree is contrary to the law.”

Assignment of Error No. 3:

“The Court erred in making said decree as the undisputed evidence shows that the plaintiff made written demand upon the defendants to drain said land and they refused to do so and failed, neglected and refused to perform their mandatory duty of keeping the drainage ditches constructed on said land for

the purpose of draining the same, and keep the ditches cleaned out so that the water would flow through the same and thereby the damage complained of was caused."

Assignment of Error No. 4:

"The court erred in making said judgment and decree as the undisputed evidence shows that certain ditches referred to as laterals and main drag line ditches were laid out by said District as part of the original plan for draining the same, approved by the District Court of the Eighth Judicial District of the State of Idaho, in and for the county of Boundary, in proceedings duly had for that purpose under which judgment and decree it became the mandatory duty of the Commissioners of said Drainage District to keep said ditches in proper condition and repair and to maintain the same so that the water would flow through the same. That said commissioners refused to do so and that upon demand the defendant commissioners refused to do said work and that because thereof plaintiff's land was not drained."

Assignment of Error No. 5:

"The Court erred in making said judgment and decree as the undisputed evidence shows that the plaintiff has suffered the damage complained of in his complaint because of the refusal of said defendants to perform their mandatory duty of keeping said ditches in proper condition and repair."

Assignment of Error No. 6:

"The Court erred in entering said decree as the undisputed evidence shows that said defendant commissianers have failed and posi-

tively refused to perform said duty and refused to allow said ditches to be cleaned out and that said refusal was wilful and intentionally done on their part and that under the law the defendant commissioners have no right to refuse to perform said duty and that if they deemed the work to be improper or that it should not be done it is their duty to apply to the District Court for authority to change the plans, under which condition the land owner may be heard and his rights decided by the Court of competent jurisdiction.

Assignment of Error No. 7:

“The Court erred in entering said decree as the undisputed evidence shows that the plaintiff and his predecessors in interest, have paid all of the assessments levied against said land by the District and that they are entitled to have the ditches cleaned out and maintained.”

Assignments of Error Nos. 1, 2, 3, 4, 5, 6 and 7 can be grouped and argued together. Some of the authorities before cited in the brief will also be applicable to this, but in addition thereto the following, showing the individual liability of such officers, is applicable:

The commissioners are personally liable for their failure and neglect of duty to anyone who has suffered thereby, and mistake or honest intention is no excuse. The court seemed to be going upon the theory that if these parties honestly thought they did not have to perform their duties, they could violate the law, impose a seri-

ous loss upon the plaintiff, and be relieved from liability by claiming some official sanctity. That is not and never has been the rule of law where a public officer was performing a duty under which he owed a direct obligation to an individual. *Amy v. Barholder*, 11 Wallace 136; 20 L. Ed. 101, where the court said:

“The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. *A mistake as to his duty and honest intentions will not excuse the offender.*”

Proper v. Sutter Drainage District, 200 Pac. 664. Under the California Drainage District Act the districts were not liable, but the court held the commissioners liable for misfeasance in office, stating the rule as follows:

“One acting in his official capacity is individually liable for the negligent discharge of his duties.”

This is sustained in Idaho.

State v. American Surety Co., 26 Idaho 652; 154 P. 1097;

State v. Title G. & S. Co., 27 Idaho 752; 152 P. 189;

Strickfadden v. Greencreek Highway Co., 42 Idaho 738; 248 P. 456

Payne v. Baehr, 95 P. 895.

In *Payne v. Baehr*, 95 P. 895, the court laid down the rule as follows:

“A public officer is liable to respond in damages to one specially injured by his negligence or refusal to perform a ministerial duty to the extent of such special injury.”

Gutschenritter v. Whitmore, 139 N. W. 567:

“A public officer is liable to one injured from his acts with respect to a ministerial duty, whether of nonfeasance, misfeasance, or malfeasance.”

Hupe v. Sommer, 129 P. 136, where it was necessary for an officer to pass on a claim so it could be presented for payment, and he would not do so, the court said:

“If the defendant without sufficient excuse refused to perform them, he inflicted a wrong upon the plaintiff, and should be liable for whatever loss was thereby occasioned.”

Tholkes v. Decock, 147 N. W. 648:

“Public officers are answerable to private persons for injuries resulting from the negligent performance of their ministerial duties.”

Leary v. Board of Drainage Commissioners,
89 S. E. 803;

Bice v. Brown, 167 Pac. 1097.

In the case of *Croft v. Millard County Drainage Dist.*, 202 P. 539, the court of Utah says:

“Furthermore, if the drainage district is liable for the wrongs complained of, it is difficult to see upon what principle its officers

and agents, by whom the wrongs were perpetrated, can be held immune from responsibility.”

Perkins v. Blauth, 127 P. 50.

“The bond is also liable.”

Thompson v. Hughes, 121 N. E. 387;

People v. Brown, 111 N. E. 557;

State v. Hundley, 87 So. 890;

Leary v. Board of Drainage Commissioners,
89 S. E. 803.

The court having ordered this work done and having entered a decree against the district to do the work, it is our contention that the district officials had nothing but a ministerial duty to do and perform the work. County commissioners and all officers of such districts in Idaho can only do what the law requires them to do. They cannot exercise independent judgment and there is no discretion in them. These districts are organized only upon the theory of a special improvement and the party who pays his money is to get the benefits thereof, Booth vs. C. A. Groves, et al, 43 Idaho 703, 255 Pac. 637; Burt, et al, v. Farmers' Co-op. Irrigation Co., Ltd., 30 Idaho 752.

Section 41-2536 of Idaho Codes, imposes upon the commissioners an absolute requirement to do this work. That is the limitation and extent of their authority.

In Gorman v. Board of Commissioners of

Boise County, 1 Idaho 553, on page 556, the court said, as to a board of county commissioners, which are a much higher type of board than a drainage district, as the latter is the lowest form of corporation known to the law:

“A board of county commissioners is a tribunal created by statute with limited jurisdiction and only quasi judicial powers, and cannot proceed except in strict accordance with the mode provided by statute. It has no right or authority to adopt any other mode than that required or provided by statute. *The statute is its guide, and a strict adherence to it is as essential as that of the mariner to his compass.* The whole tenor of the text-books and the authorities is to this effect. There is and can be no safety in any other rule. Men’s rights cannot be defeated by the mere discretion of such an inferior tribunal, and not even by one of much more extended jurisdiction. Leave, when once given, to go outside of the statute and make rules and regulations to govern in such cases, would be very dangerous, not only to the letter but to the spirit of the law.”

Prothero v. Board of County Commissioners,
22 Idaho 598:

“The board of county commissioners has only such powers as are expressly or impliedly conferred upon it by statute.”

Corker v. Commissioners of Elmore County,
10 Idaho 255:

“A board of county commissioners has neither express nor implied power to accept the resig-

nation of a bidder to whom they have duly and regularly awarded a contract under Section 875, Revised Statutes * * * for the care, keeping and repair of the roads of a contract road district."

Johnson v. Young, 53 Idaho 271, on page 285, where on a rehearing they confirmed the rule laid down in the case of Gorman v. County Commissioners, 1 Ida. 553, *supra*.

Vol. 2, McQuillin Municipal Corporations, Sec. 499, the rule is laid down as follows:

"As heretofore stated, the powers of the municipal corporation are derived from the charter or act of incorporation, and, hence, its officers may only perform such duties as are prescribed therein or by legislative act applicable, or which may be implied, or which are indispensable, in order to enable the corporation to perform the purposes of its creation. *In the discharge of their duties the officers cannot go beyond the law, nor delegate their powers, wherein judgment and discretion must be exercised.* These rules are firmly established and enforced uniformly by the courts."

In Idaho irrigation districts are the lowest form of corporations known, Breckenridge v. Johnston, 108 P. (2d) 833, where the court said:

"Drainage districts are special improvement districts of limited liability. * * *

"The functions of a drainage district are business and economic, rather than political or governmental."

In addition to the above it is said:

“No question of taxation for governmental purposes or for the maintenance of governmental functions is involved. *Assessments are made in proportion to the benefits received and are intended primarily to serve and advance the proprietary interests of the land owners within the district.*”

This being so the commissioners must look to the statute to give them authority to exercise their own judgment as to whether land should be drained or not. It cannot be found in the decree confirming the assessment, and as a condition to allow it to be placed against this land the court ordered the district to

“Within a reasonable time, clean out, deepen and improve the present drainage ditch so as to suitably and effectively drain the land of objectors, to-wit: (Then follows a description of the land in controversy.)”

In the last hearing the court entered his decree and findings, and in the findings found that the objectors, then the owners of this land, were entitled to have these ditches cleaned out and kept cleaned out to the original depth, PP. 202, 205. By the decree it provided that the Commissioners of the district

“Be and they are hereby instructed to forthwith, at the expense of said District and as an item of maintenance chargeable to the entire district, proceed to clean out said ditch to the original level thereof *and maintain said ditch*

to said original level, construct such laterals as may be required, etc."

By the last decree he again ordered :

"The Commissioners are Further Ordered, to deepen and clean out the ditches now constructed in said Drainage District to such depth as may be necessary and to construct such other ditches within said Drainage District as may be necessary to sufficiently drain all the land within said Drainage District to such extent as may be necessary to make all of the land within said Drainage District suitable for agricultural purposes." P. 172.

He also provided for placing a pump at a certain place, and said :

"And cause such pump to be operated at all times that may be necessary to provide suitable drainage for the land not drained by the drainage system as now constructed, etc."

That was just imposing on the commissioners what the statute provides for. Sec. 41-2539 requires the drainage district to

*"build and maintain drains, etc., * * * to the end that the land in the district may be reclaimed."*

It nowhere, at no place, intimates that they have any discretion in the matter whatsoever, and we most earnestly submit that as the court, having full jurisdiction, three times decided this question and ordered this work done, such decrees and orders are conclusive, binding on the district and the commissioners, the landowners and all

courts, and as these decrees require the work be done and as the statute requires the work be done, the commissioners had no discretion and it was their imperative, mandatory duty to do this, the failure of which subjects them to liability, especially as the "failure" was brought about by their personal interest.

Assignment of Error No. XIV :

"The Court erred in failing to find that said defendants had failed, neglected and refused to perform their duties as Commissioners of Drainage District No. 1 and keep the drainage ditches cleaned out and open so that the water would flow through the same and said fact is conclusively shown by the evidence in this case.

NO DISCRETION IN COMMISSIONERS BUT MANDATORY AND MINISTERIAL DUTY TO KEEP DITCHES OPEN.

In addition to the statute quoted the following authorities are decisive on this question.

County v. Drainage Dist. No. 1, 139 N. W. 649, where the law made it the duty to take care of highways where they crossed ditches. The court held there was no discretion in the matter.

Stoddard v. Keeke, 116 N. E. 193, where the court said:

"Under Farm Drainage Act, par. 17 and 41 (Hurd's Rev. St. 1915-16 * * *), the duty of the commissioners is to construct a sufficient drain to afford ample drainage for all of the

lands in the district which have been assessed, and it is not discharged by construction of a ditch once adequate which later becomes inadequate and causes damage to land. * * * The provisions of such sections are mandatory.”

This general rule is applied to all manner of actions of the commissioners of these districts:

19 C. J. 700, par. 191:

“It is the duty of the drain commissioners, county surveyor, or other officer designated by statute to see that public drains are cleaned out and kept open and in proper repairs. * * * The officer having supervision of the drain may generally act upon his own initiative when he is satisfied that the repairs are needed, and his action is not dependent upon the filing of a petition or the giving of notice to persons interested or affected.”

People v. Commissioners, 22 N. E. 596, where the court said:

“In the statute before us it is clear that a duty is imposed upon public officers, and that the rights and interests both of the public and of third persons are involved, and that they have a claim as matter of right that the highway commissioners should exercise the power given them, and the duty devolved upon them of keeping the public road clear and free from fences or other obstructions that render it impossible to travel thereon. * * * The duty on them to act is imperative, and the discretion given them is merely in respect to a matter which is incidental to the performance of such duty.”

Peotone & Manteno Union Drainage Dist. v. Adams, 45 N. S. 266. There the court said:

"Under the section of the statute *supra*, *where an error has been committed*, can the drainage commissioners shield themselves behind what they term a 'discretionary power,' and thus leave the landowner without any remedy whatever? If they could, the law ought to be repealed at once, in order to prevent others from being imposed upon by its unjust provisions. But we think the statute gives a negative answer to the inquiry. The statute nowhere says that a discretion exists where a wrong has been committed on one of the landowners, but, on the other hand, it says that they shall use the corporate funds of the district to carry out the original purpose, to the end that all lands shall receive their proper benefits, as contemplated when the lands were classified. Under these two sections of the statute, we do not think any discretion is vested in the commissioners, but, on the other hand(the duty enjoined is imperative. * * * High, in his work on Extra-ordinary Legal Remedies (section 413), says: 'Where by act of the legislature, the duty is plainly and imperatively incumbent upon the common council of a city to make certain street improvements, the writ will issue for the enforcement of the obligations.'"

Under the Idaho statute there is no intimation even that the commissioners are to be given any discretion. The plan must be submitted when the district is in its formative period. The parties have a hearing on the plan as submitted. The court approves the plan as submitted. The court orders the work done and the assessments made on the plan as submitted. It would be a stretch of

all human imagination to even think that any legislature after providing just how the thing should be done would thereby imply that if the commissioners did not like it they could refuse to do it, or do it in some altogether different manner. In other words if the condition that has arisen here can be carried out then one can have his land and his money taken from him by the action of these commissioners absolutely contrary to the law and contrary to the decisions of the court.

Thompson v. Hughes, 121 N. E. 387, where the Supreme Court of Illinois laid down the rule as follows:

“The duties of commissioners do not end with the completion of the original system, and if found defective they must remedy the defect *and maintain the drains and ditches*, and if they fail to keep them in repair they are liable to a penalty, and the landowner has a remedy by mandamus to compel them to perform their duty. * * * They are also liable for damages caused to an owner of land which has been assessed for the system of drainage for neglect of their duties. (Reciting instruction requested). It was said that under the Levee Act (Hurd’s Rev. St. 1917, c. 42) the obligation and power of the commissioners are the same as under the Farm Drainage Act, and a positive duty was imposed upon the commissioners to afford proper drainage to land which had been assessed. * * * The duty declared by statute is specific, and the performance of it is not discretionary, although

the commissioners have a discretionary power to determine the system of drainage and in regard to the location and drains and the details of the work."

That is exactly our position here. The commissioners here unquestionably had the right to say whether they will keep the ditches cleaned out until the banks stood up, or putting in spiling, or digging around the slides or to do any work in the detail of draining the land. They have a right to say whether they will clean them out with the drag line or by hand and of these various things the owner cannot complain, but they have no right whatsoever to refuse to clean out the ditches.

Again in this case they are taking the water from the higher land and throwing it onto Woldson's land and refuse to remove it. They have no right to do that.

Leary v. Board of Drainage Commissioners,
89 S. E. 803:

"It is true that the drainage district is a quasi public corporation. * * * But it is not a governmental agency, and occupies the same relative position as a railroad company, or any similar quasi public corporation created for private benefit, but endowed with the right of eminent domain and other public functions by reason of the public benefit. * * * We are also of opinion that though no bad faith or malice on the part of the commissioners individually is indicated in the evidence, they

are individually liable because there was no legal authority for them to extend their canal beyond the limits of the district in such a manner as to divert the water upon the lands of the plaintiffs to their detriment. * * * But they are not exempt from liability for their torts or contracts. And the commissioners, as their agents, are individually liable if they act illegally or negligently, so as to injure others outside of the district."

Here this rule should apply with all of its force and effect. In Idaho drainage districts are not even given the standing of quasi public corporations.

Breckenridge v. Johnston, 108 Pac. (2) 833. There they were simply business corporations for special improvements and of limited liability. Here the two commissioners responsible for these actions are interested parties.

Exhibit 1 on page 109 of the record is the schedule of the assessments levied against this land from 1924 to 1927 and on page 104 the levies for 1938, 1939 and 1940 are given. The record shows that the land was assessed at \$47.5016 an acre and from the amount of land in the district it shows that \$119.75 per acre already has been levied on this land, *collected and the land not drained*. On this 220 acres of land there has been \$26,389 already levied and collected. Who got the benefit of this? The other landowners in the district. Bauman got spiling

through his land to prevent sloughing through there. He refuses to even permit Woldson's to be drained. The record is conclusive on the fact that these commissioners have refused to drain this land and will not and do not intend to do so. Plaintiff's Exhibit No. 3. At the meeting where they passed that resolution he declared "that it would be a waste of money, etc.,"

"A. Mr. Bauman said that we had spent more money than that land was worth." P. 179.

Again calling Bauman's attention to the statements in Exhibit 3, that this reclamation could not be accomplished and would be a waste of money, he was asked:

"Q. That was your opinion? A. Yes sir.

"Q. That is the position you took? A. That was just the way we felt.

"Q. And for that reason you did not do anything further towards reclaiming it, did you?

"A. That was a good reason."

In view of the fact that the same year Woldson spent \$1500.00, causing the water to drop two feet and got 90 acres of the 220 plowed, and that the additional slides caused by the wet, soggy banks, began to again fill up the ditch so that it lacked from 1½ to 2 feet of letting the water drain out, goes to show beyond any question that when the slides are removed and the ditches kept cleaned the water will drain out of

this area into the sump, and instead of standing close to or on the surface of Woldson's land, making it soggy so it cannot be cultivated, the water will stand from 3 to 4 feet below the surface, making the land tillable and, as testified to, the best land in the district. All of which goes to show that there was no merit whatever in the commissioners' contention, and again goes to show the reason why they have no right to arbitrarily set up their own opinions as against the orders organizing the district, directing the reclamation, and the three distinct orders finding that the land would be drained, and ordering it drained, entered when the matters were actually heard in court.

There was considerable talk by the commissioners about the work done in 1940, but when we got down to what they had actually done we found they had directed the slides to be cleaned out and limited the work at not to exceed two 8-hour days, Exhibit 35, P. 447.

We found that after Mr. Woldson had notified them he would have to go ahead and do the work, these two commissioners stated they would not be responsible for anything of that kind, Exhibit 22, P. 21. Bauman told some parties, including the witness Morkelberg, and the witness Nelson, and put in the answer, that it was doing damage to the high lands to drain this low land.

His actions are personal and he is refusing to do his duty because he personally thinks his land is going to suffer. The record shows that they never made any real investigation of this end of the district whatever and when asked about it did not know anything about how much of it was being plowed, how much of it was in crop, what had been done on the ditches or little of anything else. Even the defendant Copeland said he thought that all of the ditches had been cleaned out in 1939 whereas, as a matter of fact they had refused to pay Farnum for doing the work on only part of the ditches, and he was one of the commissioners who voted against making the payment. If a commissioner can accept a position of public office then say that he will let his own personal interests control and that other persons who have land in that district cannot have their land drained because he is personally afraid that it will hurt him, then he should be ousted from office. He was not selected as commissioner of the district to look after his personal interest but to do that which the law required him as commissioner to do, namely, to have all of the land in the district drained. There is no showing in the record that the drainage would hurt Bauman's land but there is a showing that he positively has refused to do his duty because he thinks such will be done. For a small sum they could crib out these slides on this ditch

with spiling or plank driven in the ground and it has been done in other parts of the district but they even refuse to do that. As an example of how little they know what they were doing, Bauman testified that in cleaning out the ditches in 1940 and 1941 they had spent half the maintenance fund in that district, P. 422-424. He finally admitted that included more than one-half the drainage ditch and drained more than half of the district, but when we got him down to how much that 50% was, he testified:

“Q. Do you know how much you spent?

A. In cleaning out the ditches in 1941 I do.

Q. How much?

A. A thousand dollars.”

It was then shown that their maintenance that year was 4½% and that the total valuation for assessment purposes of the district was \$204,000, making over \$9,000 maintenance fund which they raised and only \$1,000 spent on the Mirror Lake area. His maintenance tax that year would have been about ½ the amount they spent in the whole 2200 acres. But that is not altogether the criterion because this land had been soaked with water for years. All the witnesses testified it will take some years use of the land before it will stand up and get hard so that the work will not have to be done. The court allowed these

witnesses to testify that they cleaned out the ditch but when they got down to what they did or where they did it, they could not tell or it was merely insignificant work of a day or so, and nowhere did they ever try to claim that they cleaned out other than the main ditch through Woldson's land. It is our contention that where the district has built a ditch known as the rim ditch, it is just as much their duty to keep them cleaned out as it is any other ditch. It would catch this water before it seeped down into the land and came up in form of springs. That is what it was put in there for and it has been ordered maintained by the court. The other drag line ditches were built through Woldson's land by the District. No farmer could afford to maintain a drag line to clean out his ditches, and as he paid for maintenance, he should have it. They never made any claim of cleaning them out and positively refused to do so. To show how far these people went, Copeland said that 75% of the money of the entire district had been spent for the benefit of 600 or 700 acres of the Mirror Lake district. We challenged that and they could not produce a single item to sustain it. They had the books and records in their possession. We could not get them until after the case was being tried in court. He finally admitted that the main ditch on which the money actually was spent drained about 2500 acres out

of the 4400, P. 404. Bauman and Copeland both tried to say that in 1940 they cleaned out the ditch twice but upon re-calling the secretary, Plaintiff's Exhibit No. 35, P. 447, which was the minutes of the commissioners meeting of July 7, were produced, and it showed that they refused to do more than clean out two slides in the main ditch not to exceed two eight-hour days. That is the sum total that they cleaned out this ditch in 1940 and that was in the main ditch and not in any of the other laterals. It is for reasons of this kind that the law has limited these people in their authority to clean out ditches and not give them any discretion in the matter. If these people have discretions so that they can clean out the ditches, or not, as they see fit, then if they think their land is being left too dry they can do as they have been doing. In our opinion the reason the law is made mandatory and that they are not given any discretion is so that the commissioners and all of them have to do exactly what the law requires.

DEFENSE

In addition to the matters above set forth the defendants pleaded as an alleged defense an order on a petition filed by Mr. Woldson as a bondholder of the district asking that all of the ditches be cleaned out and improvements made, etc. The Court for some reason at that time, and

very probably because of the moratorium law of 1933, which is House Bill No. 105, P. 54 Idaho Session Laws 1933, the 1935 Act again extending it, dismissed the proceedings without prejudice and with a right to renew it at any time. They tried to plead that as a settlement for Woldson's rights as a landowner whereas the proceeding was brought by him for the protection of some bonds that he held. Of course, it is well settled that where a matter is dismissed without prejudice to bring it again it is not a settlement of the rights of the parties.

Abraham v. Casey, 179 U. S. 210; 45 L. Ed. 156;

Lyon v. Perin & Gaff Mfg. Co., 125 U. S. 689; 31 L. Ed 839;

Moore v. Russell, 65 Pac. 624.

Wells v. Western Union T. Co., 123 N.W. 371, where the court says:

"The dismissal of an action in the federal court without prejudice, after the federal circuit court of appeal had reversed judgment for plaintiff, and remanded the cause, is not an adjudication which bars a subsequent action in a state on the same action."

Harrison v. Remington Paper Company, 140 Fed. 385, where Judge Sanborn said:

"Rulings and decisions in the course of an action which is subsequently dismissed without prejudice to a future action raise no estoppel. The only adjudication by such a judgment is

that nothing is adjudged and that the parties are as free to litigate the issue as though the action had not been commenced.”

Hardin v. Hardin, 129 N. W. 108:

“The particular right or cause of action named therein being preserved by the former decree, it necessarily follows that the plaintiff’s right to prove his cause of action by any competent evidence is also preserved, even though the evidence necessary to prove it be identical with that in the former action.”

We respectfully submit that the defense pleading the order set out by the defendants is without merit and the court made no finding on that defense.

Assignment of Error XV:

“The court erred in sustaining the objection to the admission in evidence of plaintiff’s exhibits 20, 21 and 23.”

These exhibits were called for in the praecipe but as they were rejected exhibits they have been sent up and are not printed in the record. In a way they are but accumulative. They constitute the letter from Martin Woldson to the Drainage District under date of November 30, 1940, being Plaintiff’s Exhibit 8 and the bill thereto attached, shown on pages 132 to 135 of the record, and also the checks, and bills which he paid.

They are simply a conclusive proof of the fact that the bills were paid, the amount of them, and the testimony showed that they are necessarily

incurred. If an officer fails to do his duty and the party who has the right to have that duty performed does perform it, or have it performed, he certainly is entitled to the compensation therefor if it is reasonable, but in addition to that, in this case it was in mitigation and reduction of the damages.

Martin Woldson had the right to do this work and charge the expense as damages. He did not have to stay there year after year, paying these taxes and not get the land drained. If he could drain this land in a couple of years, then the defendants would be absolved from further damage. In the first year it is shown that he got between 90 and 100 acres of it cropped. That would be a reduction in damages of \$900 to \$1,000. If it took two years it would duplicate that amount. If by doing the same amount of work or less the next year he could complete the draining of the land, then he would be mitigating the damages, and he had a right to do this, as it is a fundamental principle that where one can reduce or mitigate the damages they should do so,

Christensen v. Gorton, 36 Idaho 436,

Collins v. Twin Falls etc., Water Co., 28 Idaho 1,

Buhl Highway Dist. v. Allred, 41 Idaho 54.

Woldson did not have to sit idly by and lose

the use of his land. He could proceed to do what was necessary to stop this loss, and certainly the defendants would be responsible therefor.

In conclusion we respectfully submit:

(1) The Court made no findings upon the issues raised by the complaint and answer in this case. Under the rules of the Supreme Court, these findings are now required as an absolutely mandatory matter on the part of the trial judge and where the findings were not made the judgment cannot stand.

(2) We respectfully submit that in this case they cannot question the right of Woldson to have these ditches cleaned out as three decisions in the state court adjudged that right and these commissioners are successors in interest and are therefore bound by those decrees, and those orders bind them, and all parties connected with them, and cannot be questioned.

(3) We further respectfully submit that under the law and the statutes of the State of Idaho the defendants have a mandatory duty to perform in maintaining and draining this land and that they have deliberately and intentionally refused to perform that duty, or as stated by Bauman himself as a witness, after calling his attention to the resolution, he said:

“Q. That is the position you took? A. That was just the way we felt.”

That was the position he took, yet in one year's time 90 acres of it was cropped.

Woldson lost the first year's use of all the lands but the next year got 90 acres in and saved \$900 damage. In another year's time, if allowed to proceed, Woldson would have the land reclaimed and instead of suffering the damage of about \$2200 a year for the loss of the use of the land, and paying a considerable sum more in maintenance taxes it would perpetually reclaim the land, stopping the damages for all time to come.

We respectfully submit that in this case the Court erred in entering the judgment and decree and the judgment should be reversed and judgment ordered entered in favor of the appellant.

Respectfully submitted,

EZRA WHITLA

E. T. KNUDSON

Attorneys for Appellant,

Res. & P. O. Address:

Coeur d'Alene, Idaho.

APPENDIX NO. I

VIII.

The Court erred in entering Findings of Fact No. 2 for the reason that the same is contradictory to the evidence, is not a finding of fact but is a conclusion of law and that the question of the defendants being liable for the acts of their predecessors was not an issue in controversy in this case and that no such claim was ever made by the plaintiff.

IX.

The Court erred in making Finding of Fact No. 3 for the reason that said finding of fact is not sustained by the evidence, but is contrary to the uncontradicted evidence in the case and is not a finding of fact but is a conclusion.

X.

The Court erred in making Conclusion of Law No. 1 for the reason that the same is improper, is not sustained by the evidence in the case and the undisputed evidence shows that the defendants S. M. Bauman and Roy Copeland are guilty of malfeasance, misfeasance and nonfeasance as Commissioners of Drainage District No. 1 and that they positively refused to perform their duty.

XI.

The Court erred in making Conclusion of Law

No. 2 based upon the erroneous finding of fact.

XII.

The Court erred in failing and neglecting to make findings upon the issues in this case as follows, to-wit:

(a) The Court erred in failing to make findings upon Paragraph 2 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction.

(b) The Court erred in failing to make findings upon paragraph 3 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction, and the allegations are sustained by the undisputed evidence in the case.

(c) The Court erred in failing to make findings upon Paragraph 4 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction, and the allegations are sustained by the undisputed evidence in the case.

(d) The Court erred in failing to make findings upon paragraph 5 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true

and ordered by the court having jurisdiction.

(e) The Court erred in failing to make findings upon Paragraph 6 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction.

(f) The Court erred in failing to make findings upon Paragraph 7 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction.

(g) The Court erred in failing to make findings upon Paragraph 8 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction.

(h) The Court erred in failing to make findings upon Paragraph 9 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true and ordered by the Court having jurisdiction and the uncontradicted evidence shows that the said Commissioners refused to comply with their duties and do said work.

(i) The Court erred in failing to make findings upon Paragraph 10 of plaintiff's complaint which is material in this case to find that the matters complained of by plaintiff were true

and ordered by the Court having jurisdiction and the allegations of said paragraph are conclusively shown and there is no dispute thereto.

(j) The Court erred in failing to make findings upon Paragraph 11 for the reason that the same are material in the case and are shown by the uncontradicted evidence to be true and shows that the defendants wilfully and intentionally refused to perform their duties as Commissioners.

(k) The Court erred in failing to find upon Paragraph 12 for the reason that the same is shown by the uncontradicted evidence in the case to be true and is material in the case.

(l) The Court erred in failing to find upon Paragraph 13 for the reason that the same is shown by the uncontradicted evidence in the case to be true and is material in the case.

(m) The Court erred in failing to find upon paragraph 14 for the reason that the same is shown by the uncontradicted evidence in the case to be true and is material in the case.

(n) The Court erred in failing to find upon paragraph 15 for the reason that the same is shown by the uncontradicted evidence in the case to be true and is material in the case.

(o) The Court erred in failing to find upon paragraph 16 for the reason that the same is

shown by the uncontradicted evidence in the case to be true and is material in the case.

XIII.

The Court erred in failing to sustain the objections and exceptions of Martin Woldson to the proposed findings of fact as shown by said exceptions and objections filed herein.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARTIN WOLDSON,

Appellant,

vs,

S. M. BAUMAN, ROY COPE-
LAND and THE NATIONAL
SURETY COMPANY, a corpo-
ration of the State of New York,

Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District
Court, For the District of Idaho,
Northern Division

HON. CHARLES C. CAVANAHA, District Judge

O. C. WILSON

Bonnors Ferry, Idaho,

EVERETT E. HUNT

Sandpoint, Idaho,

Attorneys for Appellees

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SUMMARY OF CONTENTS OF BRIEF:

General statement of the case and Pleadings,
pages 2 to 15.

Statement of Evidence, pages 15 to 26.

Discussion of Assignments of Errors, pages 26
to 27.

Argument, pages 27 to 30.

Conclusion, pages 30 to 32.

AUTHORITIES

Section 41-2531, Idaho Code Annotated

McDonald vs. Pretzl, 60 Ida. 354.

No. 10128

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MARTIN WOLDSON,

Appellant,

vs,

S. M. BAUMAN, ROY COPE-
LAND and THE NATIONAL
SURETY COMPANY, a corpo-
ration of the State of New York,

Appellees.

BRIEF OF APPELLEES

Appellees controvert Appellant's Statement of the Case and present the following:

STATEMENT OF THE CASE

The Appellant, MARTIN WOLDSON, hereinafter referred to as the plaintiff, seeks a judgment against the Appellees, S. M. BAUMAN, ROY COPELAND and THE NATIONAL SURETY COMPANY, a corporation of the State of New York, hereinafter referred to as the defendants, for \$7049.83 as damages and the entry of penalty against the individuals of \$500.00 and their removal as Commissioners of Drainage District No. 1 of Boundary County, Idaho.

The defendant Bauman qualified as such commissioner on June 30, 1939, and the defendant Copeland on January 12, 1940.

The particular Complaint of the plaintiff herein is that the defendants Bauman and Copeland have not drained the lands of the Mirror Lake District and the plaintiff's demand for damages relates back and is attempted to be based upon an order of the Court made August 20, 1924; and all of the

evidence introduced by him relates to work which was done or ordered to be done as long ago as nineteen years and twenty years prior to the dates that the defendants Bauman and Copeland qualified as commissoners of said Drainage District.

It appears that the land now owned by the plaintiff is situated below the level of the main ditch system and there is not sufficient fall from his land to the outlet of the district to carry off the water emanating on plaintiff's land which said lands, to a large extent, are admittedly situated in what formerly was a natural lake.

The original plan for reclamation of this district was admittedly not sufficient to reclaim the area of land owned by the plaintiff and his adjoining land owners.

Between 1921 and 1940 various programs were attempted and cast aside in an endeavor to reclaim these lands. Booster pumps were installed and in the year 1940 new booster pumps of greater capacity and better design were installed by the defendants herein in an endeavor to reclaim the lands of the plaintiff.

Likewise, pumping the year-round was inaugurated by the two defendant commissioners in this action, which plan never heretofore had been followed.

Between the years 1925 and 1940 large sums of money were expended by the District and about \$6,000.00 expended by property owners in an endeavor to reclaim the lands of the plaintiff. In other words, the plaintiff, regardless of all of the expenditures of money made in an endeavor to reclaim his land, and regardless of all of the expenditures of money made in an endeavor to reclaim his land, and regardless of the conduct of the defendants herein and funds expended by them for the same purpose, now brings this action for a personal judgment against these defendants, one of whom did not become a commissioner until 1939 and the other until 1940. In support of his contention, the plaintiff goes into the record to show the entire history of the attempt to reclaim his land since the years 1920, regardless of the fact that under no rule of law can the defendants herein be charged with liability for any acts done or any failure of duty of other commissioners prior to the

time of their appointment in 1939 and 1940. This he does in spite of the fact that in his own testimony (Tr. page 312) he says:

Q. About 1939 what did you do relative to insisting on the Commissioners proceeding to drain that land?

A. Well, I was talking with them from time to time every year trying to get them to do something to drain the land and they would do some from time to time but a very little, and **in 1939 I believe they did more that year than they ever did at one time before.**

Q. Take the year 1935, did they do any work at all in draining that land at that time?

Judge Hunt: Now I feel that we must object this is not binding upon these defendants when they took office only in 1939 and 1940. These are acts that the two defendants here had no authority to interfere with nor did they have anything to do with them in any way.

The Court: I think I suggested that they were not to be held for any act of the commissioners who held the office prior to their coming in.

The defendants contend that since they have been commissioners of the Drainage District they have done everything possible with the funds at their command and within the limits of their right as commissioners to expend funds

of the Drainage District on maintenance to reclaim the lands of the plaintiff and further contend that the plaintiff's remedy, inasmuch as his problem is one of drainage and not maintenance, is found in Section 41-2531 I.C.A. as amended by Chapter 49, Idaho Session Laws of 1935. And the defendants further contend that after having waited approximately nine years during a period of various changes in the personnel of the Board of Commissioners of the Drainage District the plaintiff is now estopped from bringing this action against these defendants.

It is further contended by the defendants and not disputed that since these two defendant commissioners qualified as commissioners of said District that over 90 per cent of all district funds available for maintenance has been expended in the Mirror Lake District, comprising approximately 700 acres, 220 of which is the property of the plaintiff, notwithstanding the fact that the entire district comprises approximately 4400 acres.

REPLY TO THE APPELLANT'S BRIEF

Briefly replying to the plaintiff's statement of the case, we submit the following:

On Page 5, paragraph 1 it is said, ' The commissioners then alleged that this would be done and that when it was done the land would be suitably drained and that it was a necessary expense to be borne by the entire district (P. 199).' Once again we must state that the commissioners referred to were not the defendants in this action. Again on Page 7 of the Brief in the third paragraph it is stated, "And it further appearing that the above mentioned Order of the Court has not been complied with by the commissioners that have since been in office." Again this does not refer to the defendants in this action. On Page 8 of the Brief in the first paragraph thereof it is stated, "This was the third Court Order requiring this work to be done.

"Under the last order the commissioners did proceed to do some work and spent the entire \$23,000.00 * * *."

The order referred to (Tr. pages 31-34) is as follows:

In the Matter of Drainage District No. 1
of Boundary County, Idaho.

O R D E R

In the above entitled matter, the Commissioners of Drainage District No. 1 having made application to the Court for an Order for permission to do additional work and incur additional expense in connection with the drainage of the land within said Drainage District, which has not been drained by the work heretofore done, said application being based upon Findings of Fact and Conclusions of Law and Order and Decree made and entered by the Court in the above entitled matter on the 16th day of March, 1925, by which it was determined by the Court that certain additional work should be done by the Commissioners of said District for the purpose of furnishing additional drainage to the land of certain objectors who appeared in opposition to the confirmation of certain assessments proposed to be made against the land of said objectors within the limits of said district and it appearing from the report of the present Commissioners of said Drainage District that there has been a change in the Commissioners of said District since said Order was made and it further appearing that the above mentioned Order of the Court has not been complied with by the Commissioners in the office at the time said order was made or by the Commissioners that have since been in office,

And whereas, by said above mentioned Order it was adjudged that an emergency existed requiring the construction of certain work, the cost of which would be borne as

maintenance charge against said District and the Commissioners on this application having (27) presented with their application, plans of their Engineer for the construction of the work heretofore ordered to be done by the Court pursuant to the above mentioned Order made March 16, 1925, the total estimated cost of said improvement being Twenty Three Thousand (\$23,000.00) Dollars in accordance with a detailed estimate hereto attached, reference to which is hereby made and the same made a part hereof.

Wherefore, it is ordered, that a new outlet be constructed by the Commissioners of said Drainage District No. 1 with a grade approximately two (2') feet lower than the present outlet of said District,, said original outlet not to be changed or interfered with at all, the new outlet to be located as follows:

Beginning at the junction of the Main and Fry Lake ditches of Drainage District No. 1, which point is about 300' North of the Southwest (SW) corner of Lot Six (6) Sec. 19, Twp. 62 N. Rg. 1 E. B. M. running thence Northerly across said Lot Six (6) to the left bank of the Kootenai River a distance of about Five Hundred (500') feet.

The Commissioners are further ordered, to cause the necessary pipe to be put in place for the purpose of carrying the water out of said Drainage District thru said proposed outlet and also to cause all pipes to be installed that may be necessary or advisable to successfully drain land and conduct the water thru said outlet.

The Commissioners are further ordered, to deepen and clean out the ditches now constructed in said Drainage District to such depth

as may be necessary and to construct such other ditches within said Drainage District as may be necessary to sufficiently drain all the land within said Drainage District to such extent as may be necessary to make all of the land within said Drainage District suitable for agricultural purposes. (28)

The commisisoners are further ordered to install a pump at the following location, to-wit:

Approximately at the section corner common to Sections 31 and 32, Twp. 62 N., R. 1 E.B.M. on the township line between Twp. 61 and 62 N., R. 1 E.B.M.

and cause such pump to be operated at all times that may be necessary to provide suitable drainage for the land not drained by the drainage system as now constructed, provided, however, that in the discretion of the Commissioners the pump now in use may be moved to the above mentioned location instead of installing an additional pump if the Commissioners shall determine that the result can be accomplished by moving the location of the pump now installed.

Done in Open Court this 20th day of February, 1928.

W. F. McNAUGHTON,
District Judge.

(Endorsed): Filed Mar. 6, 1941. (29)

The record shows compliance with that Order of the Court. (Tr. pages 1239-140 and subsequent testimony). It must be stated, however, that **neither this Order nor any other**

Court Order was ever directed to the defendant commissioners in this action.

Again in the last paragraph of plaintiff's Brief on Page 8 it is stated, "Thereafter the commissioners agreed with him that they would not levy any more assessments against his land until they had drained the same. They did not follow this agreement but continued to levy maintenance charges against the land in controversy, although never draining the same." Needless to say, Commissioners have no power to refrain from levying assessments without order of Court and **the commissioners referred to were not the defendant commissioners** herein.

On Page 12 of plaintiff's Brief it is stated, "All Mr. Woldson wanted and ever demanded was that the ditches be cleaned out as originally provided for." The record shows that all of these ditches were cleaned out in 1939, twice in 1940, and twice in 1941. (Tr. pages 400, 421, 422)

Testimony of Roy Copeland:

Q. Since you became commissioner of Drainage District (321) Number One, I will ask you if you and the other Commissioners have done anything in an effort to keep the

ditches open in the southern end of the district, known as Mirror Lake?

A. Yes, sir, we have been over them three or four times.

Q. With a dragline?

A. Yes sir, and over these slide areas I think that there have been two different times besides the times we were through the rest of the area.

Page 421, Testimony of S. M. Bauman:

Q—The question is why did you pump it out of Drainage District number one in the winter time? A. To get rid of the water.

Q. Prior to 1939 had the Commissioners done any pumping in the winter time?

A. I don't think so, not to my knowledge.

Q. Now, Mr. Bauman, since you became Commissioner state (344) whether or not it is customary for the Commissioners to clean out the main ditches in Mirror Lake.

A. Yes sir, that is the height of our ambition.

Q. That was the custom.

A. Yes, it was our ambition to keep them clean.

Q. How do you do that?

A. We have gone through from the booster pump to the junction in 1940, 1941 and 1939. In 1941 we went quite a bit further and at intervals we had slides cleaned out. When the dragline was operating on the south side of the main ditch whenever it would come handy to

reach in and clean out these slides it was done, we would have that done.

Q. How often was that done in 1941, 1939 and 1940?

A. In 1940 it was done twice.

Q. In 1939? A. Cleaned it out once in 1939.

Q. Have you cleaned it out this year?

A. Yes sir.

Q. More than once?

A. Yes sir, three times, a part of it.

Mr. Woldson himself testified: (Tr. page 312)

Q. About 1939 what did you do relative to insisting on the Commissioners proceeding to drain that land?

A. Well, I was talking with them from time to time every year trying to get them to do something to drain the land and they would do some from time to time but a very little, and **in 1939 I believe they did more that year than they ever did at one time before.**

Q. Take the year 1935, did they do any work at all in draining that land at that time?

Judge Hunt: Now I feel that we must object this is not binding upon these defendants when they took office only in 1939 and 1940. These are acts that the two defendants here had no authority to interfere with nor did they have anything to do with them in any way.

The Court: I think I suggested that they were not to be held for any act of the commis-

sioners who held the office prior to their coming in.

It may be noted that the defendant Bauman qualified as a commissioner on June 30, 1939 but that the defendant Copeland did not qualify as a commissioner until January 12, 1940. By Mr. Woldson's own admission we find that real work on this project commenced when Bauman became a commissioner in 1939. Nevertheless, the plaintiff seeks to punish these two defendants for acts allegedly occurring in the nineteen or twenty years prior to the date that these two defendants assumed office.

At the top of Page 16 of plaintiff's Brief he states, "... Decided it upon the question that in his opinion the commissioner had a discretion in cleaning out the ditches and not doing the work, or not doing the work, to drain the land as they in their opinion thought best." The Findings of Fact and Conclusions of Law of the Trial Judge are brief but completely cover all pertinent questions involved. However, plaintiff's statement as quoted above is entirely in conflict with the Conclusions of Law and Findings of Fact of the Trial Judge.

EVIDENCE

We have stated before that notwithstanding the fact that the defendant Bauman qualified as a commissioner on the 30th day of June, 1939 and the defendant Copeland qualified as a commissioner on the 12th day of January, 1940, nevertheless, the plaintiff in his testimony and in his Brief repeatedly refers to alleged acts of malfeasance, misfeasance and nonfeasance of Drainage District commissioners during a period of nineteen years and twenty years prior to the dates that these two defendants assumed office. The Trial Judge permitted this testimony for the purpose of showing the creation and organization of the District and for the purpose of showing what work and what amount of funds had been expended in an effort to drain the lands in question. Nevertheless, the plaintiff, throughout his entire case, has attempted to build up a case against the defendant commissioners herein by virtue of alleged misfeasance of former commissioners of this District. The theory of the Trial Judge is well stated in the following: (Tr. pages 96, 97, 98 and 100)

(Argument of Counsel)

The Court: Under the statement as to the period of time involved here, where you are suing the two parties individually and seeking judgment individually, not against the District as a District but individually, it would seem under the law that the period of their liability would be from the time they were appointed as members of the Board and attempted to function as members. Evidence prior to that time as to whether the District had made assessments, seems to me as against these men would be immaterial. That these defendants, when they came into the District, that is, when they became members of the Board, that they refused to perform their duties under the Order of the State Court, that, of course, would be another (8) question, but to go back in 1920, where the pleadings admit certain things, and to try to hold these defendants for the conduct of the District, seems to me that it may be entirely without the pleadings.

Mr. Whitla: We are not trying that.

The Court: But you are suing these men individually here. It would be unjust.

Page 97.

The Court: . . . But to go back of those years and say these men would be liable for (83) making or failing to make assessments and drain the land, that would not be the law, and would not be within the issues here.

Page 98.

The Court: It occurs to me that under these pleadings that you could show that this land was within the District. Let's see, I think it is

admitted. The organization of the District is admitted. That the land is within the District is admitted. Now then, at the time these three individuals who are now commissioners came into office, the fact that the land had been previously assessed by the District and that the land had not been drained could not be charged to these men, they would not be liable for what the plaintiff had paid previous to that time or as to its application. If there was a liability, it would be the District or the Commissioners previous to these defendants. They would not be liable prior to the time they came into office. You can show the assessments but it would be acts of other people, and they would (84) be liable only from the time they came into office and not previous neglect of others.

It would be unjust to say that you could put men in office nineteen years after something was done and hold them responsible. I cannot see that they are liable.

Page 100.

The Court: I will state again that the parties have the right to show if they can, that this District was organized and when; whether this land of the plaintiff's was and is in that District and subject to be assessed for drainage purposes; whether the land was drained or was not, and up to the time these two men were appointed or made members of the Board, what was the condition that confronted them when they (86) entered on the duties or the office of Commissioners. They are chargeable with their own neglect. Now, if you were saying the District it would be a different matter, but you are picking out these two men who were put on this commission on a certain date. You can show the condition as I have stated but

they are bound by the date these men were put in office. Now, as to whether the previous Commissioners drained this land or not is immaterial here. It would be unjust to hold officers in damage for what someone else might have done or not have done. Now you understand, let's go ahead.

That a determined effort was made by the defendant commissioners to drain the land of the plaintiff is shown by the testimony of the witness John Davidson, who by the way, at the time of the hearing, was a commissioner of the District and was purchasing lands in this District from the plaintiff on contract.

Tr. page 154. (Testimony of John Davidson)

Q. Do you pump night and day, or how do you pump?

A. You have reference to the booster pump.

Q. Whatever pumps you use in draining that land.

A. We have kept the pumps running for the benefit of the District.

Q. Do they run summer and winter?

A. At present, yes sir.

Q. Since 1938 have you run them in the winter as well as in the summer? A. Yes sir.

Q. Every month during the year.

A. The last two years.

Tr. page 159-160.

Q. In order to get the water out of Mirror Lake, what have the Commissioners done to assist the water in its flow?

A. Built a pumping plant.

Q. You call that what?

A. Booster pump.

Q. How many booster pumps have you?

A. Two pumps in that plant.

Q. You have a pump where the water gathers and you pump it from there, you give it a kick and boost it on? A. Yes sir. (131)

Q. Have you several pumps?

A. Two.

Q. Two that have been in operation last year?

A. Yes sir.

Q. When did you get the last pump?

A. Last year.

Q. Isn't it a fact that you got a bigger pump because the smaller pump would not carry the load?

A. We have a modern system, we have a smaller motor with a bigger capacity.

Q. You got a bigger pump last year?

A. Yes sir.

Q. That was while Mr. Copeland and Mr. Bauman were on the Board?

A. Yes sir.

Q. Up to that time you used smaller pumps?

A. Yes sir.

Q. Did the Commissioners get any paddle wheels to kick the water along in those ditches?

A. That was an experiment a good many years ago.

Testimony Roy Copeland (Tr. page 403)

Q. Were you familiar with the pumping in 1927?

A. Well, not very much, no.

Q. Do you know whether they pumped continuously?

A. In 1927.

Q. Yes. A. I know they did not pump continuously, I know that.

Q. What period of the year did they pump?

A. They pumped during the spring and until after the crop (324) was taken in.

Q. As a rule there was no pumping in the fall and winter?

A. No sir.

Q. Since you have been a Commissioner and since Mr. Bauman has been a Commissioner, tell the Court what the policy has been in regard to pumping.

A. Since I have been Commissioner the pumps run continuously, they are automatic, they run whenever there is enough water for them to start.

Q. Every month of the year.

A. Yes sir, every month of the year. They started in the fall of 1939.

Testimony of S. M. Bauman. (Tr. pages 421-422)

Q. —The question is why did you pump it out of Drainage District number one in the winter time?

A. To get rid of the water.

Q. Prior to 1939 had the Commissioners done any pumping in the winter time?

A. I don't think so, not to my knowledge.

Q. Now, Mr. Bauman, since you became Commissioner state (344) whether or not it is customary for the Commissioners to clean out the main ditches in Mirror Lake?

A. Yes sir, that is the height of our ambition.

Q. What was the custom.

A. Yes, it was our ambition to keep them clean.

Q. How did you do that?

A. We have gone through from the booster pump to the junction in 1940, 1941 and 1939. In 1941 we went quite a bit further and at intervals we had slides cleaned out. When the dragline was operating on the south side of the main ditch whenever it would come handy to reach in and clean out these slides it was done, we would have that done.

Q. How often was this done in 1941, 1939 and 1940?

A. In 1940 it was done twice.

Q. In 1939? A. Cleaned it out once in 1939.

Q. Have you cleaned it out this year?

A. Yes sir.

Q. More than once?

A. Yes sir, three times, a part of it.

Testimony of Martin Woldson. (Tr. page 336)

Q. Since 1939 what has been the policy of the Commissioners relative to pumping?

A. You mean do they pump in the winter?

Q. Yes, do they pump in the winter time?

A. Yes sir.

Q. Has the policy that the Commissioners adopted after 1939 had anything to do with the draining of your land since 1939?

A. With the whole district.

Q. That helped drain it? A. Yes sir.

In addition to the policy of pumping the year-round, first established by the defendants in this action, a new and enlarged booster pump was purchased by the drainage district commissioners after the defendant Bauman qualified as a commissioner.

Tr. pages 220-421. (Testimony S. M. Bauman)

Q. That surface water drains to the District? A. Yes, it cannot go anywhere else.

Q. Where was, — strike that, — were you familiar with the old booster pump?

A. Quite so.

Q. What was that used for?

A. To raise the water out of the sump and throw it over the dam to the ditch below.

Q. How high does that raise the water?

A. Around eight or nine feet.

Q. Were those pumps changed at any time recently?

A. In 1939 when I went on the Board we had a pump that was connected up with two motors, fifty horse electric motor and a fifteen horse power motor. When there was lots of water we used the fifty horse motor and when there was just a little water we used the fifteen. We put in a new one in 1940 about the first of the year.

Q. What type of motor was that?

A. Fairbanks-Morse

Q. Is that pump automatic? A. Yes sir.

Q. Prior to that time had you any automatic pump there?

A. Not there, no sir.

Q. How does that run, as to months and seasons?

A. The new one?

Q. Yes.

A. That depends on the flow of water.

Q. Is it available to run every day of the year?

A. Yes sir.

Q. Does it run every day, if there is water?

A. Yes sir.

Q. That is, if there is water in the sump.

A. Yes.

Q. For how long has that automatic pump been there?

A. We started it about the first of the year 1940. I cannot say whether it was late in December or the first of January, 1941, — I mean in 1940.

Q. In 1939 did you have that pump run winter and summer?

A. I don't think it ran all the time until 1939.

Q. Did it run in the winter of 1939?

A. Yes sir.

Along the foothills adjoining the plaintiff's land there was originally constructed what was known as a rim ditch. This ditch was for the purpose of collecting surface water that drains down to the low lands from the surrounding hills. The plaintiff himself testified that it was necessary for him to clean out the rim ditch at his own expense, yet he testifies (Tr. page 316) as follows:

Q. In 1940 what was the condition of the ditches then. Was any work required at that time?

A. Yes sir, it was required to go over all of the dtiches.

Q. Mr. Farnum went over them in 1939. How many years had it been since these drag-line ditches and the rim ditch were cleaned out before that?

A. A number of years past.

And thereafter to the same point the plaintiff testified (Tr. page 332)

Q. This work that Mr. Farnum did, was he employed by the District? A. Yes sir, in 1939.

Q. It was paid for by the District?

A. Yes sir.

Q. You didn't pay for any of it? A. No sir.

Further, the plaintiff refused to allow the defendants to build a new ditch around the slides in the ditch draining his land.

Testimony Martin Woldson. (Tr. pages 334-335)

Q. It is a fact that in the spring of 1941, Commissioners Bauman and Copeland asked permission to build a ditch around these slides?

A. They talked to me.

Q. They asked for that permission?

A. We were talking about it, whether it would be better.

Q. Yes, and they asked for permission?

A. They didn't ask permission.

Q. I will ask you if it is not a fact that you refused to construct the new ditch?

A. I don't think I refused any permission, but I told them that it wasn't a good idea to cut off that land behind (249) and asked how could we drain that land behind.

Q. And you told them not to do it?

A. Yes, I told them not to do it.

ASSIGNMENTS OF ERRORS

The plaintiff devotes a large portion of his Brief in a plea that this case should be reversed due to the fact that the Trial Judge did not make Findings of Fact concerning all of the material issues. The only material question of fact in this case is whether or not the defendants Bauman and Copeland are guilty of misfeasance, nonfeasance or malfeasance in their duties as commissioners of this District. The Trial Court made a specific finding in paragraph three of its Findings of Fact that these defendants were not guilty of malfeasance, misfeasance or nonfeasance in their duties as commissioners of this District.

Included in that same paragraph was a finding "That said defendants are not personally liable on honest intentions or errors in judgment as commissioners of said Drainage District." This finding may or may not be more

properly a Conclusion of Law, but, in any event, such a Finding is in accordance with the law and the facts in this case.

As stated heretofore, the Trial Judge permitted evidence to show the creation of the District in 1920 and certain Court records for the sole purpose of obtaining the history of the transaction and enlightening the Court as to the issues involved but not for the purpose of proving any liability on the defendants Bauman and Copeland for the acts of their predecessors. These facts being admitted and being purely collateral issues, do not require specific Findings of Fact by any Trial Judge.

ARGUMENT

The defendants contend, and have conclusively shown as heretofore set forth, that they are not liable in damages and are not guilty of nonfeasance, malfeasance or misfeasance.

They further contend that the plaintiff's remedy in obtaining the drainage of his land is not an expense of maintenance which should be borne by the District and that if the plaintiff desires his land properly drained, as opposed to the maintenance of ditches now constructed,

he must comply with the provisions of Section 41-2531, Idaho Code Annotated, which is as follows and as it has been construed by the Supreme Court of the State of Idaho:

Section 41-2531:

“Additional construction work and assessments. — In any case where the **work** set out in the plan for **drainage** as provided in this chapter, is **found insufficient** a **new estimate of benefits** may be made, based on the **additional work proposed**, and **additional assessments** may be made on **the lands benefited** in conformity with the procedure hereinbefore provided, and the lands in said district, or any part of such lands, shall be **assessed in proportion** to the **benefits estimated** as **accruing to such lands because of such additional work and improvements.**”

The above section was construed by the Court in McDonald vs. Pretzl, 60 Idaho 354, and the Court says, at page 357:

“Appellant sought a writ of mandate to compel the commissioners of respondent district to levy assessments to pay principal and interest of these remaining bonds. The commissioners refused to do so on the ground the assessment of costs of \$118,547.00, as first confirmed, was the limit of liability resting on the landowners; the additional cost not having been authorized by court order as provided and assertedly required in Section 41-2531, I.C.A., or Section 41-2530 I.C.A., passed in 1919, Idaho Session Laws,

chapter 183, page 562, and the amendment of 1919 to section 58, chapter 168 of Title 32, Compiled Laws (chap. 16, sec. 23, Sess. Laws 1913, p. 73). These amendments are now contained in Sections 41-2561, 41-2562, and 41-2563, I.C.A.

‘The trial court considered correct respondents’ theory that the assessed cost for construction as confirmed by the Court was the limit of liability (in the absence of further court order), and entered judgment accordingly denying the writ, hence this appeal.

‘The sole and ultimate question of law involved resolves around this conclusion of the trial court:

‘III, That the commissioners of said District have no right or authority to make calls or assessments against the lands within said District for any or all of the above named purposes (construction and preliminary proceeding costs) in excess of 100 per cent of said assessment roll as confirmed by the Court, **‘without court action.**

‘Appellant contends that as long as the total assessments for construction costs, though in excess of those first confirmed, are within the assessment of benefits as found by the court on confirmation (i.e. \$440,869.-11) the commissioners had authority to make such additional assessments without court order or notice to the landowners; and that if this theory is not correct, since all the money paid out by the District in construction costs was for the benefit of the landowners, equity justifies the assessments to repay the bondholders for the amount they contributed’.”

The Court held with the conclusion of the trial Court.

And in the same case used the following language at pages 363 and 364, which is peculiarly applicable to this case:

"It is clear that when the commissioners of said district became aware of the fact that the funds raised by the bond issue were about to be exhausted and that a great amount of work was yet to be done they should have proceeded to levy an additional assessment in the manner provided by said section 4522. As we understand appellant's position he is seeking to avoid payment of the proportion of the additional expense assessed against his land upon the sole ground that the drainage commissioners attempted to make said assessment a lien upon his land without submitting it first to the District Court and, after notice to all interested parties, obtaining confirmation of said assessment by the court. From the findings of the Court, which are sustained by the evidence, it is clear that appellant had ample opportunity to go into court and compel the commissioners to first submit another estimate of the proposed expenditures to the court and obtain its confirmation before proceeding with the additional work."

CONCLUSION

We respectfully submit:

That the defendant Bauman was appointed as commissioner of the Drainage District on

the 30th day of June, 1939 and is not liable for any of the acts of his predecessors and the evidence conclusively shows that he has not been guilty of any acts of misfeasance, malfeasance or nonfeasance.

That the defendant Copeland was appointed as commissioner of the Drainage District on the 12th day of January, 1940 and is not liable for any of the acts of his predecessors and the evidence conclusively shows that he has not been guilty of any acts of misfeasance, malfeasance or nonfeasance.

That the National Surety Company, bondsmen for the above named defendants Bauman and Copeland, are not liable upon their bonds.

That the Trial Court did not err in dismissing this action for the reason the plaintiff has failed to prove any acts of misfeasance, malfeasance or nonfeasance upon the part of the defendants.

That on the contrary, the proof conclusively shows, particularly by the testimony of the plaintiff himself, that more work was done in an effort to drain the plaintiff's land during the years 1939, 1940 and 1941 than ever before.

That all year-round pumping was inaugurated by the District after the defendant Bauman became a commissioner thereof and that new and enlarged pumping equipment was established after the defendants Bauman and Copeland became commissioners of the District. Further, that the ditches, including the so-called rim ditch, were cleaned out at least once every year after these defendants qualified as commissioners, a policy, which according to the testimony of the plaintiff himself, had not been in effect for several years prior to the appointment of these two commissioners.

Respectfully submitted,

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